15-1129

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~1167.~~ 819

CHARLES E. LEWIS, PLAINTIFF IN ERROR,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BARBOUR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED MARCH 19, 1881.

SUPREME COURT OF THE UNITED STATES.

No. 1167.

CHARLES E. LEWIS, PLAINTIFF IN ERROR,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BARBOUR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

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1 In the circuit court of the United States for the district of Kansas.

CHARLES E. LEWIS, PLAINTIFF,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF Barbour County, Kansas, defendant. } 1501.

Be it remembered that on this day, to wit, March 13, 1876, the plaintiff, by his attorneys, filed in the clerk's office of said court his petition and præcipe in said entitled action, which said petition and præcipe are in the words and figures following, to wit:

Petition.

In the circuit court of the United States for the district of Kansas.

CHARLES E. LEWIS
vs.
THE BOARD OF COUNTY COMMISSIONERS OF Barbour County, Kansas.

The board of county commissioners of the county of Barbour, State of Kansas, was summoned to answer Charles E. Lewis in a plea of debt, and thereupon the said Charles E. Lewis, who avers that he is a citizen of the kingdom of England, complaining of the said county of Barbour, which to be a municipal corporation created by existing under the laws and citizen of the State of Kansas, and for cause thereof states that heretofore, to wit:

On the first day of September, A. D. 1873, the said defendant,
2 at said circuit, by its certain writings obligatory, numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, sealed with its corporate seal, signed by S. H. Ulmer, its presiding justice, and attested by M. D. Houck, its clerk, bearing the said date, and here shown to the court (see Ex. A), acknowledged itself indebted, and bound to pay to the Lexington, Kansas and South western Railroad Company, or bearer, the sum of one thousand dollars, by each of said bonds payable at the National Park Bank of New York City on the first day of September, A. D. 1873, with interest thereon from date thereof, at the rate of ten per cent. per annum, payable semi-annually on the 1st days of March and September of each year thereafter, on the presentation and delivery, at the said National Park Bank in the city and State of New York, of the coupons or interest warrants annexed thereto.

And said bonds recite that they were issued under and in pursuance of an act of the legislature of the State of Kansas, entitled "An act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of
3 railroads, water power, or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith," approved March 2nd, 1872.

Said bonds were duly registered in the office of the auditor of the

State of Kansas, said certificates of registration having been signed by D. W. Wilder, auditor of said State, on the 19th day of November, A. D. 1873. Interest warrants or coupons were annexed to each of said bonds, payable as they severally became due, on the presentation and surrender at the National Park Bank of the City and State of New York.

And the plaintiff herein avers that he is the owner and holder of said bonds and coupons, and that there is due and unpaid thereon, though the payment thereof has been repeatedly requested, the installments of interest on said bonds which fell due on the first day of September, A. D. 1875.

4, 5 The plaintiff also state that on the day and year aforesaid at the district aforesaid, the said defendant, by its certain writing obligatory No. 1, sealed with its corporate seal, signed by S. H. Ulmer, its presiding justice, and attested by M. D. Houk, its clerk, and here shown to the court, acknowledged itself to be indebted and bound to pay to The Lexington, Kansas and Southwestern R. R. Co., or bearer, the sum of 1,000 dollars, to be paid in 20 years from the date thereof, with interest at the rate of 10 per centum per annum, payable to bearer semi-annually on the 1st days of M'ch & Sept. in each year as they become due, at New York City, on the presentation and surrender, at the National Park Bank, of the coupons for interest annexed to said bonds.

And the plaintiff says that he is the bearer of said bond and coupon, and that an installment of interest on said bond No. 1, for fifty dollars, and the coupon therefor, fell due on the 1st day of Sept., A. D. 1875; that the time for the payment thereof has elapsed, and the defendant has neglected to pay the same.

The plaintiff also state that on the day and year aforesaid, at the district aforesaid, the said defendant, by its certain writing obligatory No. 2, sealed with its corporate seal, signed by S. H. Ulmer, its presiding justice, and attested by M. D. Houk, its clerk, and here shown to the court, acknowledged itself to be indebted and bound to pay to The Lexington, Kansas & Southwestern R. R. Co., or bearer, the sum of 1,000 dollars, to be paid in 20 years from the date thereof, with interest at the rate of 10 per centum per annum, payable to bearer semi-annually on the 1st days of M'ch & Sept. in each year as they become due, at New York City, on the presentation and surrender at The National Park Bank of the coupons for interest annexed to said bonds.

And the plaintiff says that he is the bearer of said bond and coupon, and that an installment of interest on said bond No. 2 for fifty dollars, and the coupon therefor, fell due on the 1st day of September, A. D. 1875; that the time for the payment thereof has elapsed, and the defendant has neglected to pay the same.

(Here follow 98 separate counts (page 6 to page 54 inclusive), omitted per stipulation of counsel—see page 141.)

55 The defendant herein has neglected, and still neglects, to pay any part of said installment of interest, by reason whereof the said defendant has become liable to pay, and an action has accrued to the plaintiffs herein to have and recover of the said county the said installments of interest which fell due on the aforesaid bonds at said date, being one hundred (100) coupons of fifty (50) dollars each, making the sum of five thousand (5,000) dollars, with interest thereon from the first day of September, A. D. 1873, when said coupons fell due.

Wherefore the plaintiff prays judgment against the said defendant

the Board of County Commissioners of the County of Barbour for the sum of five thousand (5,000) dollars, with interest and costs.

CHARLES E. LEWIS,
By GRANT & SMITH,
His Att'ys.

STATE OF IOWA,
County of Scott:

I, James Grant, being duly sworn, depose and say that I am one of the attorneys in the above entitled cause; that the same is based upon written instrument in my possession and under my control; that the allegations of the above petition are true, as I verily believe.

JAMES GRANT.

STATE OF IOWA, *Scott County:*

Subscribed and sworn to before me this 10th day of March, A. D. 1876.

[SEAL.] W. M. KAEISER,
Notary Public in and for Scott County, Iowa.

56 EXHIBIT A.

Copy of bond.

UNITED STATES OF AMERICA:

Number 1. Twenty years.

Barbour County railroad bond.

BARBOUR COUNTY, STATE OF KANSAS:

Twenty years after date Barbour County, in the State of Kansas, for value received, promises to pay to the Nebraska, Kansas and Southwestern Railroad Company, or bearer, the sum of one thousand dollars, with interest thereon from date at ten per cent. per annum, payable semi-annually on the first days of March and September of each year, upon the presentation and surrender as they severally become due of the proper coupons "therefore" hereto attached, both principal and interest payable at the National Park Bank, in the city and State of New York, without relief from valuation or appraisement laws.

This bond is one of a series of one hundred bonds of one thousand dollars each, all of like tenor and date, and numbered consecutively one to one hundred, issued for the purpose of aiding in the construction of the Nebraska, Kansas and Southwestern Railroad through said Barbour County, in the State of Kansas, under and in pursuance of an act of the legislature of the State of Kansas entitled "An act to authorize counties, incorporated cities, and municipal townships to issue bonds
57 for the purpose of building bridges, aiding in the construction of railroads, water power, or other works of internal improvements, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith," approved March 2nd, 1872.

In witness whereof the said Barbour County, in the State aforesaid, has caused this bond to be signed by the chairman of the board of county commissioners and attested by the county clerk this 1st day of September, A. D. 1873.

[SEAL.] S. H. ULMER,
Chairman Board Co. Commissioners.

Attest:
M. D. HOUK, *Co. Clerk.*

STATE OF KANSAS, *ss:*

I, D. W. Wilder, auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine, and that the same has been duly registered in my office according to law.

In witness whereof I have hereunto set my hand and affixed my seal of office, at the city of Topeka, this 19th day of November, 1873.

D. W. WILDER, *Auditor.*

The following endorsements appear on the back of said bond, viz:

"One thousand dollars Barbour County railroad bond. Principal and interest payable at the National Park Bank, in the city of New
58 York. Interest ten per cent. per annum, payable on the first days of March and September each year."

Also, "One thousand dollars."

"One thousand dollars."

Copy of coupon.

On or before the first day of September, 1875, Barbour County, in the State of Kansas, promises to pay to the bearer fifty dollars, at the National Park Bank, in the city of New York, for value received, the same being the semi-annual interest due on railroad bond No. 1.

S. H. ULMER,
Chairman Board Co. Commissioners.

M. D. HOUK, *Co. Clerk.*

(On the margin:) $50.00.

(Endorsed:) No. 1501. In cir. ct. U. S. Charles E. Lewis vs. The Board of County Commissioners of Barbour Co., Kansas. Declaration. Filed March 13, 1876. A. S. Thomas, clerk, by C. Thomas, jr., deputy. Grant & Smith, Davenport, Iowa, for compl't.

Precipe.

In the circuit court of the United States for the district of Kansas.

CHARLES E. LEWIS
vs.
THE BOARD OF COUNTY COMMISSIONERS OF Barbour County, Kansas. } Precipe.

To the clerk of said court:

59 You will issue summons in the above entitled cause in a plea of debt. Debt, $5,000; damages, $5,000. Returnable according to the rules of said court.

GRANT & SMITH,
For Plaintiff.

(Endorsed:) No. 1501. In the circuit court of the U. S., dist. of Kansas. Charles E. Lewis vs. The Board of County Commissioners of the county of Barbour Precipe. Filed March 13, 1876. A. S. Thomas, clerk, by C. Thomas, jr., deputy. Grant & Smith, Davenport, Iowa.

And on this day, to wit, March 13th, 1866, the clerk of said court issued a writ of summons in said entitled action; which said writ of summons, with the endorsements and marshal's return thereon, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, district of Kansas, ss:

The United States of America to the marshal of the district of Kansas, greeting:

You are hereby commanded to notify the Board of County Commissioners of Barbour County, Kansas, that it has been sued by Charles E. Lewis in the circuit court of the United States for the district of Kansas, and that unless it answer by the twelfth day of April, A. D. 1876, the petition of the said Charles E. Lewis against it, filed in the clerk's office of the said court, such petition will be taken as true and judgment rendered accordingly. You will make due return of this writ on
60 the 23rd day of March, A. D. 1876.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Topeka, in said district, this 13th day of March, A. D. 1876.

A. S. THOMAS, *Clerk*,
By C. THOMAS, JR., *Deputy*.

(Endorsement:) Suit brought for the recovery of money. Amount claimed, $5,000.00 with interest from the day of , A. D. 18 , at the rate of per cent. per annum and costs. Damages, $5,000.00. Grant & Smith, attorneys for plaintiff. No. 1501. Circuit court of the United States, district of Kansas. Charles E. Lewis vs. The Board of County Commissioners of Barbour County, Kansas. Summons. Issued March 13th, 1876. Returnable March 23, 1876. Grant & Smith, attorney' for plaintiff.

U. S. marshal's return.

DISTRICT OF KANSAS, *ss:*

Rec'd this writ Mch. 13, 1876, and served same on the within named de'ft, the Board of County Commissioners of the County of Barbour, Kans., at Barbour Co., State & dist. of Kansas, on the 22nd day of March, A. D. 1876, by delivering to Jos. McNeal and S. J. Shipler, each of them personally, a true and certified copy of this writ, with all the endorsements thereon. He said Jos. McNeal being then and there the chairman and said S. J. Sheply the clerk of said defendant, the Board of County Commissioners of the County of Barbour, Kansas.

W. S. TOUGH,
U. S. Marshal,
By B. L. THOMAS, *Dept.*

Marshal's fee, $22.00.

Filed April 17th, A. D. 1876.

A. S. THOMAS, *Clerk*.

61 And on this day, to wit, March 20th, 1876, the plaintiff, by his attorneys, filed in the clerk's office of said court his security for cost in said entitled action; which said security for cost is in the words and figures following, to wit:

Security for costs.

In the circuit court of the United States for the district of Kansas.

CHARLES E. LEWIS
vs.
THE BOARD OF COUNTY COMMISSIONERS OF the county of Barbour. } 1501. At law.

We enter ourselves security for costs in said case, and promise to pa*ll* all costs which may accrue to the opposite party in this action or to any of the officers of this court. And in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, we hereby agree and stipulate that execution may issue against our property for any costs taxed against him.

Dated this 18th day of March, 1876.

WHIT. M. GRANT.
W. M. KAEISER.

(Endorsement:) No. 1501. Chas. E. Lewis vs. The Board of County Commissioners of Barbour Co. Filed March 20, 1876. A. S. Thomas, clerk. Approved. A. S. Thomas, clerk.

62

63 And on this day, to wit, April 28, 1876, the defendants by their attorneys filed in the clerk's office of said court their answer in said entitled action, which said answer is in the words and figures following, to wit:

Answer.

In the circuit court of the United States for the district of Kansas.

CHARLES E. LEWIS, PLAINTIFF,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF Barbour County, Kansas.

And now comes the said defendant by its attorneys, A. M. F. Randolph and Stillings and Fenlon, and, answering the petition of the said Charles E. Lewis, in this cause filed, says for its—

FIRST DEFENSE. That it denies each and every allegation contained in said petition except such as are hereinafter admitted.

SECOND DEFENSE. And for a second and further defense to the said petition, the defendant *the defendant* herein alleges, that on or about the 27th day of August, A. D. 1873, at an*d* election duly held on said day in said county of Barbour, in the State of Kansas, the qualified electors of said county voted upon certain propositions in writing, as follows, to wit: Shall the county of Barbour order, by a vote of the legal electors, thereof, the board of county commissioners of said county to issue the bonds of the said county to the amount of one hundred thousand dollars to the Nebraska, Kansas and Southwestern Railroad Company, to aid in the construction of said road by a donation thereto by issuing
64 and delivering the said bond' to the said road therefor; the said bonds are to be payable in thirty years from date, bearing in-

terest at the rate of seven per cent. per annum, and payable semi-annually on the first day of March and the first day of September in each year, principal and interest payable in the city of New York; said bonds to be issued and deposited in the office of the treasurer of the State of Kansas, and delivered to the said railroad company only upon the conditions following, to wit:

First. When the said company or their assigns shall complete the said railroad from Hutchinson, in the State of Kansas, or any other point on the Atchison, Topeka and Santa Fé Railroad to the town of Medicine Lodge, there shall be delivered to said company or their assigns fifty thousand dollars of said bonds.

Second. And when said company shall have their road built and cars running to the town of Sun City, in Barbour County, there shall be delivered to said company fifty thousand dollars of said bonds; provided, that said company shall build and maintain a depot at the place their road shall cross Main street, in the town of Medicine Lodge, and that said road shall cross said street at some point south of Kansas avenue, in said town; that this road shall build and maintain a depot within one-fourth of a mile of Lake City, and that they shall build and maintain a station located at a certain point between Lake City and Medicine Lodge, and depot in Sun City; or if said road shall build so as to strike Sun City before it reaches Medicine Lodge, then fifty thousand of said bonds shall be issued when the road is completed and
65 the cars running from some point on the Atchison, Topeka and Santa Fé Railroad to Sun City; provided, that said company shall within ninety days thereafter have their road built and their cars running from Sun City Medicine Lodge; and when the road is completed and the cars are running from some point on the Atchison, Topeka and Santa Fé Railroad aforesaid via Sun City to Medicine Lodge there shall be delivered to said company the remainder of said bonds, the depots and stations to be built as aforesaid; that said road shall of the usual gauge so as to connect with other roads and shall be of first-class in material, construction, and equipage; that no interest shall become due until six months after said bonds are delivered; that if said company, or their assigns, shall not have their road completed and the cars running to the town of Medicine Lodge from the city of Hutchinson or some other point on the Atchison, Topeka and Santa Fé Railroad within eighteen months after the time of voting said bonds, then the said fifty thousand dollars shall be forfeited by said company; and if not to the town of Sun City within twenty-one months from the date of voting said bonds, the said company shall forfeit the right to fifty thousand dollars of said bonds, as far as the above conditions are concerned; that these propositions shall not be construed as binding the county, so that these bonds cannot be charged to another road by a vote of the people of this county if such other road shall build first; that if the said bonds are not issued to said company, then they shall be delivered to Barbour County by the treasurer of State, and that the duly declared result of said election showed a ma-
66 jority of qualified electors of said county who voted at said election voted for the said railroad donation and bonds aforesaid subject to each and all the terms and conditions as above set forth.

And that since the said 27th day of August, A. D. 1873, the board of county commissioners of the said county of Barbour has not been, by the qualified electors of said county, at any election duly had and held for that purpose, authorized and empowered to vary, change, or modify in any respect whatever the terms and conditions as above set

forth and stated, upon which the board of county commissioners of said county of Barbour was ordered and authorized to issue and deliver the bonds of said county to the amount of one hundred thousand dollars to aid in the construction of the said Nebraska, Kansas and Southwestern Railroad by a donation thereto as aforesaid: and that no contract has ever been made by and between the said county of Barbour and the said Nebraska, Kansas and Southwestern Railroad Company, or its assigns, or with any other company, corporation, or person, providing for the construction of the railroad for which bonds were voted as aforesaid, and that no work whatever has ever been done under and by virtue of any such pretended contract, and that no other vote has ever been ordered and had in said county to authorize the issue of bonds of said county to any railroad company, and that no other election has ever been ordered, had, and held in said county of Barbour for said purpose.

And this defendant further alleges that the said S. H. Ulmer, pretending to act as the chairman of the board of county commissioners of said county of Barbour, did, on or about the 10th day of November,
67 A. D. 1873, without any power or authority of the said county of Barbour or from the board of county commissioners of said county, under the pretense of aiding in the construction of the above named Nebraska, Kansas and Southwestern Railroad as aforesaid, sign each and all the pretended bonds, or writings obligatory; and the pretended coupons are mentioned and described in the said plaintiff's petition filed in this cause, and did then procure the signature to each and all the said pretended bonds and coupons of the said M. D. Houk, the acting clerk of the board of county commissioners of said county Barbour, and did then cause and procure each and all of said pretended bonds to be attested and sealed with the corporate seal of the said county of Barbour, when in truth and in fact the construction of the aforementioned railroad was thereby intended or designed to be aided by the said S. H. Ulmer and M. D. Houk, and that no work has ever been done on such pretended railroad, and that said pretended bonds and coupons have never been deposited in the office of the treasurer of the State of Kansas, or provided for by law and by the terms and conditions of the vote had and held in said county upon the certain propositions hereinbefore set forth and stated.

The said defendant further alleges that the said pretended Nebraska, Kansas and Southwestern Railroad Company was never duly organized; that said pretended company has never had a legitimate existance in the State of Kansas; further, that on or about the 16 day of January, A. D. 1873, the said pretended railroad company filed its charter in the office of the secretary of state of the State of Kansas; that said charter was thus filed by the projectors of said pretended
68 railroad company, for the purpose, among other purposes, of merely cheating and defrauding the people of said county of Barbour of the pretended bonds and coupons above described, and that the said S. H. Ulmer and the other members of the board of county commissioners of said county, and the said M. D. Houk, were parties to and engaged in the conspiracy formed as herein alleged, and formed for the aforesaid purpose, and that in violation of law and of the terms and conditions of the certain propositions voted upon in said county as aforesaid, he, the said S. H. Ulmer, did *in* or about the 10th day *day* of November, A. D. 1873, take and appropriate each and all of the said pretended bonds and coupons signed by him and the said M. D. Houk as aforesaid, and attested to and sealed as aforesaid, to his own use and benefit and that of the said M. D. Houk, and also to the use and

benefit of certain other persons conspiring and fraudulently agreeing with him for that purpose, with the intent then and thereby to cheat and defraud the said county of Barbour, and that the said county of Barbour has never received any consideration whatever for the pretended bonds and coupons above described; of all of which facts this defendant avers that the said plaintiff had due and timely notice before he became the owner and holder of each and all the pretended bonds and coupons mentioned and described in his petition filed in this cause, or before said plaintiff had any claim or interest therein.

THIRD DEFENSE.—And for a third and further defense to this action, this defendant denies that said pretended bonds and coupons, all and singular, were ever executed and delivered by this defend-
69 ant, and denies that the same, or any of said pretended bonds and coupons were ever executed and delivered by any agent, officer, or officers authorized and empowered to execute and deliver the same for and on behalf of this defendant, and denies that said auditor of the State of Kansas ever had any right, power, or authority to register said pretended bonds, and denies that said pretended Nebraska and Southwestern Railroad Company was ever organized, and that it ever had an existence in the State of Kansas, except as hereinbefore admitted.

Wherefore the said defendant alleges that the coupons, all and singular, sued upon, and other bonds in the petition specified in this action, are void, and that the said plaintiff ought not to have and maintain his said action against this defendant; and said defendant further prays that all the bonds and coupons in said petition specified may be adjudged and decreed to be null and void.

A. M. F. RANDOLPH AND
STILLINGS AND FENLON,
Attorneys for Defendant.

STATE OF KANSAS,
County of Shawnee, ss:

I, A. M. F. Randolph, being duly sworn, depose and say that I am one of the attorneys for the defendant in the above entitled, and that I believe the facts stated in the third defense contained in this answer to be true.

A. M. F. RANDOLPH.

Subscribed and sworn to before me this 28th day of April, 1876.
J. M. SPENCER,
U. S. Cir. Court of Kansas.

(Endorsed:) In cir. ct. of U. S. dist. of Kansas. No. 1501. Chas. E. Lewis vs. The Board of Co. Com'rs of Barbour County, Kansas. Answer filed April 28, 1876. A. S. Thomas, clerk. A. M. Ran-
70 dolph and Stillings and Fenlon, atty's for def't.

And on this day, to wit, April 28, 1876, there was filed in the clerk's office a stipulation extending the time to answer in said entitled suit, which said stipulation is in the words and figures following, to wit:

Stipulation.

DAVENPORT, *April 5th*, 1876.

Hon. A. M. F. RANDOLPH,
Topeka, Kansas:

DEAR SIR: We have yours of 4' & note contents. We very cheerfully give you until May 1st to answer in Lewis vs. Barbour Co. The

only conditions we exact is that you send us a copy of your answer as soon as made, that we may know as soon as possible what is required of us in the case.

Yours, truly,

GRANT & SMITH.
W.

(Endorsed:) No. 1501. C. E. Lewis vs. The Board of Co. Com'rs of Barbour Co., Kans. Stipulation extending time to answer to May 1st, 1876. Filed April 28, 1876. A. S. Thomas, clerk.

71 And on this day, to wit, June 6th, 1876, the plaintiff by his attorney filed in the clerk's office of said court his replication to answer of the defendant in said entitled suit, which said replication is in the words and figures following, to wit:

Replication.

In the circuit court of the United States for the district of Kansas.

CHARLES E. LEWIS
vs.
THE BOARD OF COUNTY COMMISSIONERS OF the County of Barbour, Kansas. } Gen'l replication.

The plaintiff denies each & every allegation of the second defence set out in the answer. And the plaintiff particularly denies the allegation "that of all of which facts the plaintiff had due and timely notice before he became the owner and holder of each and all of said pretended bonds and coupons mentioned and described in the plaintiff's petition," "or before said plaintiff had any claim or interest whatever in them."

JAMES GRANT,
For Plaintiff.

(Endorsed:) In the circuit court of the United States for the district of Kansas, Charles E. Lewis vs. The Board of County Commis-
72 sioners of the county of Barbour, Kansas. Replication.—Filed June 6, 1876, A. S. Thomas, clerk.—James Grant, for pl'ff.

And on this day, to wit, June 6, 1876, the plaintiff by his attorney, filed in the clerk's office of said court his motion in said entitled suit, which motion is in the words and figures following, to wit:

Motion.

In the circuit court of the United States for the district of Kansas.

CHARLES E. LEWIS
vs.
THE BOARD OF COUNTY COMMISSIONERS OF the county of Barbour, Kansas. } Motion.

Now comes the plaintiff and moves to strike from the record of this cause the verification of the 3rd defense.

1st. Because the same is made by the attorney of the defendant and no reason is given why it is not made by the party himself.

JAMES GRANT,
For Plaintiff.

(Endorsed:) No. 1501.—In the circuit court of the United States for the district of Kansas, Charles E. Lewis vs. The Board of County Commissioners of the county of Barbour, Kans.—Motion.—Filed June
73 6, 1876. A. S. Thomas, clerk.—James Grant for pl'ff.

And on this day, to wit, Friday, December 1st, 1876, in the November term of said court, in the record of the proceedings thereof in said entitled suit is the following entry, to wit:

Order continuing, &c.

CHARLES E. LEWIS
vs.
THE BOARD OF COUNTY COMMISSIONERS OF BARBOUR COUNTY, KANSAS. } 1501.

Now comes the plaintiff in this action, by Grant & Smith, his attorneys, and also comes the defendant, by A. M. Randolph and Stillings & Fenlon, its attorneys; and thereupon it is ordered that this cause be, and the same is hereby, continued generally, with leave as to defendant to amend its answer in ninety days, and to plaintiff to reply in thirty days thereafter, each party to serve the other by mail with copy; and it is further ordered that this case be set for the second day of the next term hereof.

And on this day, to wit, June 7, 1877, in the June term of said
74 court, in the record of the proceedings thereof in said entitled suit, is the following entry, to wit:

Jury empanneled.

CHARLES E. LEWIS, PLAINTIFF,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF BARBOUR COUNTY, KANSAS. } 1501.

Now comes the plaintiff, by James Grant, his attorney, and also comes the defendant, by A. M. Randolph and Stillings & Fenlon, its attorneys; and to try the issues joined herein come also a jury, to wit: L. H. Sargent, John A. Watkins, C. E. Falkner, Geo. F. Walton, I. O. Savage, Wm. Allen, R. H. Cunningham, John M. Jorden, Charles Coffin, W. F. Chalfant, A. L. Selig, and J. L. McDowell, twelve good and lawful men of the body of the district of Kansas, who being duly empanneled and sworn to well and truly try the issues joined and matters submitted them in this action, and a true verdict give according to the law and the evidence, the trial is proceeded with, and the trial, not being concluded, the jury are admonished as to their duty herein, and the hearing of this case is postponed until to-morrow.

And on this day, to wit, June 8th, 1877, in the June term of
5 said court, in the record of the proceedings thereof in said entitled suit, is the following entry, to wit:

Journal entry.

CHARLES E. LEWIS
vs.
THE BOARD OF COUNTY COMMISSIONERS OF Barbour County, Kansas. } 1501.

And now come the parties, by their attorneys, same as yesterday, and thereupon came also the jury heretofore empanneled and take their seats in the jury-box, and the jury being called and all being present are thereupon discharged from the further consideration of this cause, and this action by order of court is continued at defendant's costs for the term. Plaintiff by consent of parties has leave to amend petition and file additional coupons before next term to which the present answer shall apply.

And on this day, to wit, November 27th, 1877, in the November term of said court, in the record of the proceedings thereof in said entitled suit, is the following entry, to wit:

Continued.

CHARLES E. LEWIS
vs.
THE BOARD OF COUNTY COMMISSIONERS OF Barbour County, Kansas. } 1501.

76 On motion of plaintiff, by his attorneys, it is ordered by the court that this cause be, and it is hereby, continued to the next term of this court.

And on this day, to wit, June 4th, 1878, in the June term of said court, in the record of the proceedings thereof in said entitled suit, is the following entry, to wit:

Continued.

CHARLES E. LEWIS
vs.
THE BOARD OF COUNTY COMMISSIONERS OF Barbour County, Kansas. } 1501.

It is ordered by the court that this action be, and the same is hereby, continued to the next term of this court.

And on this day, to wit, November 25, 1878, in the November term of said court, in the record of the proceedings thereof in said entitled suit, is the following entry, to wit:

Continued.

CHARLES E. LEWIS
vs.
THE BOARD OF COUNTY COMMISSIONERS OF Barbour County, Kansas. } 1501.

It is ordered by the court that this action be, and the same is hereby, continued to the next term of this court.

77 And now on this day, to wit, November 27, 1878, there was filed in the clerk's office of said court in said entitled suit motion to set aside continuance, which said motion to set aside continuance is in the words and figures following, to wit:

Motion to set aside continuance.

In the U. S. circuit court, district of Kansas.

CHARLES E. LEWIS
vs.
THE BOARD OF COUNTY COMMISSIONERS OF Barbour County, Kansas.

Now comes Charles E. Lewis and states to the court:

That on Nov. 25th, 1878, being the first day of the November term of this court said cause was, without the concurrent consent of plaintiff or his counsel, continued to the next term of said court.

That both plaintiff and his counsel reside outside of this State and at a long distance from the place of holding this court, and said place is very difficult and inconvenient for them to reach on Monday.

That counsel telegraphed to the clerk of said court that they would be present at this term, and were actually present upon Tuesday,
78 Nov. 26, 1878, the second day of said term, ready to proceed with said cause.

That said cause has been once tried by one of the judges of this court, and the cause thereafter continued for the purpose of taking the testimony of plaintiff.

That agreement has been made by counsel to try the case on the testimony already taken, with the additional testimony of the plaintiff taken as aforesaid. And no injury or detriment can therefore result to defendant by the setting aside of said continuance.

That notice of this application has been given to E. Stillings, of counsel for def't.

Plaintiff therefore moves that said order of continuance be set aside and said cause be set down for trial at this time.

CHARLES E. LEWIS,
By GRANT & GRANT, &
L. M. FISHER.

J. L.

(Endorsed:) U. S. circuit court, district of Kansas. No. 1501. Chas. E. Lewis vs. Board of County Commissioners of Barbour Co., Kansas. Motion to set aside continuance. Filed Nov. 27, 1878. A. S. Thomas, clerk, by J. N. Strickler, deputy.

And on this day, to wit, December 3rd, 1878, in the November term of said court, in the record of the proceedings thereof in said entitled action, is the following entry, to wit:

79 *Journal entry.*

CHARLES E. LEWIS, PLAINTIFF,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF Barbour County, Kansas, defendant. } 1501.

Now comes the plaintiff herein, by Grant & Smith, his attorneys, and the defendant, by Stillings & Fenlon, its attorneys, and the order con-

tinuing this action at this term is set aside; and on motion of defendant it is ordered by the court that it have leave, and it is hereby granted it, to cross-examine the plaintiff herein, and by consent of parties it is further ordered that the plaintiff be, and he is hereby, allowed to amend his petition herein, by adding new counts upon other coupons, and the defendant's answer on file to apply to amended petition and action continued.

And on this day, to wit, June 6, 1879, in the June term of said court, in the record of the proceedings therein in said entitled action, is the following entry, to wit:

Continued.

CHARLES E. LEWIS
vs.
THE BOARD OF COUNTY COMMISSIONERS OF Barbour County, Kansas. } 1501.

80 On motion of defendant it is ordered by the court that this action be, and it is hereby, continued to the next term of this court.

And on this day, to wit, November 26, 1879, in the November term of said court, in the record of the proceedings thereof in said entitled action, is the following entry, to wit:

Continued.

CHARLES E. LEWIS
vs.
THE BOARD OF COUNTY COMMISSIONERS OF Barbour County. } 1501.

By consent it is ordered by the court that this action be, and it is hereby, continued to the next term of this court.

And on this day, to wit, June 12, 1880, in the June term of said court, in the record of the proceedings thereof in said entitled action, is the following entry, to wit:

Journal entry.

CHARLES E. LEWIS
vs.
THE BOARD OF COUNTY COMMISSIONERS OF Barbour County, Kansas. } 1501.

Now come the parties, by their attorneys, and submit this action to the court; briefs to be filed in 30 days; decision to be rendered as of this term.

81 And on this day, to wit, June 11, 1880, there was filed in the clerk's office of said court agreed facts and record in said entitled action, which said agreed facts and record are in the words and figures following, to wit:

Agreed facts and record.

LEWIS
vs.
BARBOUR CO. } No. 1501.

It is admitted in this case that this suit is brought to recover upon 100 bonds alleged to have been issued by Barbour County commissioners, dated September 1st, 1873, the coupons thereon due Sept. 1, 1875, amounting to $5,000, and those due March 1, 1876, for $5,000, and those due Sept. 1, 1876, for $5,000, of one of which bonds and coupons a copy is as follows, to wit:

EXHIBIT A.

Copy of bond.

UNITED STATES OF AMERICA.

Number 1. Twenty years.

BARBOUR COUNTY RAILROAD BONDS.

Barbour County, State of Kansas.

Twenty years after date Barbour County, in the State of Kansas, for value received, promises to pay to the Nebraska, Kansas and Southwestern Railroad Company, or bearer, the sum of one thousand dollars, with interest thereon from date at ten per cent. per annum, payable semi-annually on the first days of March and September of each year, upon the presentation and surrender, as they severally become
82 due, of the proper coupons therefore hereto attached; both principal and interest payable at The National Park Bank, in the city and State of New York, without relief from valuation or appraisement laws.

This bond is one of a series of one hundred bonds of one thousand dollars each, all of like tenor and date, and numbered, consecutively, one to one hundred, issued for the purpose of aiding in the construction of the Nebraska, Kansas and Southwestern Railroad, through said Barbour County, in the State of Kansas, under and in pursuance of an act of the legislature of the State of Kansas, entitled "An act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water-power or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith," approved March 2nd, 1872.

In witness whereof the said Barbour County, in the State aforesaid, has caused this bond to be signed by the chairman of the board of county commissioners, and attested by the county clerk, this first day of September, A. D. 1873.

[SEAL.] S. H. ULMER,
Chairman Board of Co. Commissioners.

Attest:
M. D. HOUK, *Co. Clerk.*

83 STATE OF KANSAS, *ss:*

I, D. W. Wilder, auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued, that the signatures thereto are genuine, and that the same has been duly registered in my office according to law.

In witness whereof I have hereunto set my hand and affixed my seal of office at city of Topeka, this 19th day of November, 1873.

D. W. WILDER, *Auditor.*

The following endorsements appear on the back of said bond, viz:

"One thousand dollars, Barbour County railroad bond, principal and interest payable at the National Park Bank in the city of New York. Interest ten per cent. per annum, payable on the first days of March and September each year," also—

"One thousand dollars.

"One thousand dollars."

Copy of coupon.

"On or before the first day of September, 1875, Barbour County, in the State of Kansas, promises to pay to the bearer fifty dollars at the National Park Bank in the city of New York for value received, the same being the semi-annual interest due on railroad bond No. 1.

"S. H. ULMER,

"*Chairman Board Co. Commissioners.*

"M. D. HOUK, *Co. Clerk.*"

(On the margin:) $50.00.

84 The plaintiff, as hereinafter designated, purchased the bonds and coupons sued on in this action before the maturity of any of said coupons, and without notice of any fraud committed in the alleged execution and issue thereof, unless the facts hereinafter stated shall be held to be notice. The said plaintiff purchased said bonds and coupons of one W. N. Coler, under an agreement with said Coler of which the following is a copy:

Agreement.

Articles of agreement made and entered into this 1st day of December, 1873, between William Nicholas Coler, carrying on business at 17 Nassau street, New York, in the United States of America, as a dealer in America municipal bonds, under the style or firm of W. N. Coler and Company, of the one part, and Charles Edward Lewis, esquire, M. P., and Sir Harry Holyoake Goodricks, baronet, for and on behalf of a body established in London called "The Municipal Trust," of the other part:

Whereas the said Municipal Trust has been established with reference to certain contemplated investments in American municipal bonds on the principles expressed in the prospectus hereunto annexed and signed by the signatures of this agreement, and it is intended to invite subscriptions from the public for such undertaking;

And whereas the said William Nicholas Coler is in possession of or has the control over a large number of bonds of American municipalities, which he is duly authorized to sell and dispose of, including the

85 bonds, the names and particulars of which are contained in a list

or schedule hereunto annexed and signed by the signatories of this agreement;

Now it is hereby agreed and declared by and between the parties hereto as follows, that is to say:

1. The said William Nicholas Coler shall sell and "The Municipal Trust" shall (subject to the provisions of the 3d and 4th clauses hereof) purchase for the sum of £700,000 sterling such of the bonds mentioned and specified in the said list or schedule hereto annexed, or other bonds of American municipalities, as shall be mutually agreed upon between or selected by the said William Nicholas Coler and the certificate holder's committee for the time being of the said trust, and as at the time of such selection shall, when taken altogether, yield interest at the rate of £9 10s. per cent. per annum in gold on the said purchase money of £700,000, exclusive of the profit to be derived from the periodical payment of the bonds at par, and so that not more than £35,000 of the said purchase-money shall be invested in the same security.

2. The said William Nicholas Coler guarantees that all the bonds mentioned and specified in the said list or schedule hereunto annexed have been issued in conformity with the laws of the United States, and that they are valid, subsisting debts of the municipalities issuing the same, and further guarantees that the entire indebtedness of each
86 municipality in no case exceeds ten per cent. of the cash value of the property liable for the loan, and similar guarantees shall be deemed to have been given by him in respect of any bonds not included in such schedule which shall be selected for purchase, or shall afterwards be substituted for any of the selected bonds in pursuance of the 4th clause hereof.

3. The whole purchase-money for the said bonds, namely, £700,000, less £2 per cent., which the Municipal Trust is hereby authorized to deduct and retain therefrom, shall (subject as hereinafter mentioned, and to the provisions of the 4th clause) be paid to the said William Nicholas Coler in manner hereinafter mentioned; and the said William Nicholas Coler shall immediately before each instalment of the said purchase-money shall become payable deliver to the said committee bonds of the nature aforesaid, yielding interest equivalent to £9 10 0 per cent. upon the amount of such instalment; 10 per cent. of the purchase money shall be paid within one week after allotment of the certificates of the municipal trust, 25 per cent. within one week after the first instalment on the said certificates becomes due; 30 per cent. within one week after the second instalment on the said certificates becomes due; and the balance of 35 per cent. within one week after the last instalment on the said certificates becomes due, each of such payments to be made subject to the deduction of 2 per cent. as before mentioned, but none of the said
87 instalments respectively shall be paid until bonds yielding an interest equivalent to £9 10 0 per cent. per annum on the amount of such instalments respectively shall have been delivered to the said committee; and such instalments shall not carry interest in the mean time, but the interest on the bonds shall nevertheless be apportioned as if the bonds had in fact been delivered when the instalments respectively become payable and had been paid for accordingly.

4. The said committee shall be at liberty, if they think fit, by giving such notice as next hereinafter mentioned at any time within six months after the said bonds shall have been selected as aforesaid and actually deposited as herein mentioned, to reject such of them as the said committee shall think proper: Provided, nevertheless, that written no-

tice of such rejection shall, in order to make such rejection effectually, be given to the said William Nicholas Coler within the said period of six months after such selection and deposit as aforesaid, and such notice shall be deemed to have been properly given if left for the said William Nicholas Coler at the office for the time being of the trust. The said William Nicholas Coler shall, upon receiving such notice at the election of the said committee, either substitute other bonds of the nature hereinbefore mentioned, to be selected by the said committee, yielding the same amount of interest as the rejected bonds, or shall repurchase such rejected bonds at the specified prices at which
88 such rejected bonds were purchased for the trust as aforesaid.

5. In the event of the whole amount of £700,000 not being subscribed for, the said William Nicholas Coler shall, subject as hereinafter mentioned, take certificates of the said trust for the amount of the deficiency, and in the event of any certificates being forfeited through non-payment of any instalments or instalment, the same shall be taken at par by the said William Nicholas Coler, but the monies previously paid in respect thereof shall belong to the trust. The amount to be paid by the said William Nicholas Coler for the certificates to be taken by him, as provided by this clause, shall be set off against the instalments of the purchase-money when and as the same shall become due: Provided, always, that the said committee shall not be bound to invest the whole of the money subscribed in the purchase of such bonds from the said William Nicholas Coler, but shall be at liberty to retain thereout any amount not exceeding £1.10 0 per cent. on the sum so subscribed to meet the expenses of the formation of the trust as provided by the prospectus and in such case the trust shall be relieved from purchasing and the said William Nicholas Coler from providing bonds to that extent.

6. The bonds so to be selected as aforesaid shall be deposited in the hands of Messrs. Martin & Co., the bankers of the trust, or such other bankers as may be agreed upon between the said committee and
89 the said William Nicholas Coler, and the said committee shall have a lien on such bonds for all monies they may pay and certificates they may issue from time to time in respect of the purchase-money, but as soon as the purchase-money shall have been paid or discharged such bonds shall be delivered over to the trustees of the said trust.

7. All coupons or interest which shall be current in respect of the bonds to be purchased as aforesaid at the time when such bonds ought to be delivered as aforesaid shall be apportioned between the trust and the said William Nicholas Coler with reference to the times fixed for such delivery, and all subsequently accruing coupons or interest therein shall belong to the trust. The interest on any certificates taken by the said William Nicholas Coler shall be apportioned in like manner.

8. The said William Nicholas Coler shall be, and is hereby, constituted the sole American agent for the trust, so long as he and the committee shall be able to agree on the terms of remuneration.

9. This agreement is entered into by the said Charles Edward Lewis and Sir Henry Holyoake Goodricke as trustee or agents for and on behalf of the Municipal Trust, and they shall not be in any way personally liable to the said William Nicholas Coler in respect of the contract hereby made.

10. The said William Nicholas Coler shall at any time or times prior to the 27th day of March, 1874, sell to the said trust, if required
90 to do so by the said committee, bonds of the nature aforesaid in

addition to those to be purchased on the terms aforesaid at such a price in cash as will yield interest after the rate of £9 10 0 per cent. per annum in gold on the purchase money, for any amount or amounts not exceeding in the whole £300,000, and the said William Nicholas Coler will allow to the trust a commission of £2 per cent. on the amount of the purchase money in every such purchase.

Lastly. If any dispute, question, difference, or difficulty, of any nature whatsoever, shall arise between the said parties to these presents, or between the said William Nicholas Coler and the Municipal Trust, touching this agreement, or any clause or thing herein contained or the construction or meaning hereof, or any matter in any way connected with these presents, or the operation hereof, or the rights, duties, or liabilities of either party, or of the Municipal Trust, in connection with the premises or otherwise in relation to the premises, then and in every such case the matter in difference shall be referred to two arbitrators or their umpire, pursuant to and so as with regard to the mode and consequence of the reference, and in all other respects to conform to the provisions in that behalf contained in the common law procedure, act 1854, or any then subsisting statutory modification thereof. And upon every or any such reference the arbitrators and umpire shall respectively have power to examine the parties to the reference and wit-
91 nesses upon oath, and either to fix, settle, and determine the amount of costs of the reference and award respectively, or incidental thereto, to be paid by the said William Nicholas Coler and the Municipal Trust, or to direct the same to be taxed either as between solicitor and client, or as between party and party, or otherwise, and to direct and award when and by and to whom such costs shall be paid.

As witness the hands of the said parties the day and year first above written.

92 *The schedule referred to in the foregoing agreement.*

Amount.	Description.	For what purpose issued.	Rate of interest.	Date of when due.	Remarks.
$100,000	Wyandotte Co., Kansas	Bridge	10	1877 & 1887	Interest paid.
100,000	Lancaster Co., Nebr	R. R.	10	1892	Two coupons paid.
150,000	Huston City, Texas	Improvement	10	1892	Two coupons paid.
150,000	Vicksburg City & Co., Miss	do	10	1880@1892	Four coupons paid.
50,000	St. Joseph City, Mo	Bridge	10	1892	Three coupons paid.
50,000	Jasper Co., do	Railroad	10	1892	One coupon paid.
75,000	Salamca, Kansas	do	10	1892	New bonds.
80,000	Oswego, do	do	10	1892	do.
25,000	Bates Co., Mo	do	10	1882@1892	One coupon paid.
25,000	Dallas Co., do	do	10	1885	Four coupons paid.
20,000	Plattsmouth City, Neb	Funding	10	1883	New bonds.
20,000	Dickinson Co., Kansas	School	10	1878@	do.
50,000	Jefferson Co., Texas	Court-house	10	1902	do.
40,000	Dallas Co., Texas	Court-house	10	1892	do.
40,000	Dunville City, Illin's	Railroad	10	1883	do.
50,000	Hot Springs Co., Arkans	Funding	10	1877@1885	do.
50,000	Bates Co., do	Bridge	10	1883	do.
200,000	Galveston City, Texas	Improvement	10		
50,000	Ottoe Co., Nebraska	Railroad	10	1892	Two coupons paid.
25,000	Nebraska City, do	Funding	10	1892	Two coupons paid.
25,000	Buffalo Co'y do	Bridge	10	1888	New bonds.
20,000	Tremont precinct, Dodge Co., Nebraska	do	10	1880	do.
25,000	Colfax Co., Nebraska	Bridge	10	1885	One coupon paid.
124,000	Titusville City, Penns	Fundg water works & sewer	8	1878@1893	New bonds.
250,000	Toledo City, Ohio	Water works	8	1893	do.
260,000	Shreveport City, La	Railroad	8	1912	Two coupons paid.

93 *The schedule referred to in the foregoing agreement*—Continued.

Amount	Description.	For what purpose issued.	Rate of interest.	Date of when due.	Remarks.
100,000	Yanklin Co., Dakota	Railroad	8	1892	Two coupons paid.
200,000	Kansas City, Mo	Funding debt	8	1893	New bonds.
100,000	Kansas City, Mo	Railroad	8	1876@1885	Old bonds.
100,000	Vicksburg " Miss	do	8	1903	Three coupons paid.
150,000	Jackson Co	do	8	1891	Four coupons paid.
100,000	Houston City, Texas	Market house & railroad	8	1902	Three coupons paid
100,000	Pulaska Co., Ark's	Funding & County	8	1883	New bonds.
50,000	Knox Co., Mo	Railroad	8	1892	One coupon paid.
50,000	Adair Co., do	do	8	1892	One coupon paid.
50,000	Lewis Co., do	do	8	1892	One coupon paid.
50,000	Jasper Co., Mo	do	8	1891	Three coupons paid.
50,000	Dade Co	do	8	1891	Six coupons paid.
150,000	Saginaw City, Mich	Water works	8	1892	Two do.
50,000	Caris City, Illin's	Railroad	8	1892	Two do.
50,000	Moultrie Co., do	do	8	1893	New bond.
25,000	Alexander Co., do	do	8	1892	Two coupons paid.
25,000	Prelaski Co., do	do	8	"	do.
25,000	Saline " do	do	8	"	do.
25,000	Johnson Co., Illin's	do	8	"	do.
25,000	Erie City, Pa	Funding	8	1885	New bonds.
20,000	Lancaster Co., Neb	Court-house & jail	8	1871@1891	One year paid.
150,000	Douglas Co. do	Railroad	7	1900	Two "
150,000	Lynn Co., Kansas	do	7	1900	Three "
100,000	Marion				
50,000	Miami do	do	7	1900	do.
50,000	Osage Co., do	do	7	1999	do.
50,000	Jefferson Co., do	do	7	1873	1 coupon paid.
94					
50,000	Sedgwick Co., Kansas	Railroad	7	1902	2 coupons paid.
50,000	Douglas " do	do	7	1898	Sev'l " "
50,000	Franklin Co., do	do	7	1998	do.
100,000	Johnson Co., do	do	7	1899	do.
50,000	Allen Co., do	do	7	1902	do.
50,000	Pawnee Co., do	do	7	1900	do.
100,000	Montgomery Co., do	do	7	1900	do.
50,000	Atchison City do	do	7	1900	do.
50,000	Oswego tp., do	do	7	1901	do.
25,000	Ridgeway tp., do Oswego Co	do	7	1901	do.
25,000	Pavals tp., Miami Co	do	7	1900	do.
20,000	Chelopia tp., Labette Co	do	7	"	do.
25,000		do	7	"	do.
25,000	Humboldt tp., Allen Co	do	7	"	do.

(Endorsed:) Dated 1st December, 1873. C. The Municipal Trust. Copy. Agreement as to the purchase of certain American municipal bonds.

At the execution of a commission for the examination of witnesses between Charles Edward Lewis, plaintiff, versus The Board of County Commissioners of the county of Barbour, this paper writing was produced and shown to Charles Edward Lewis, and by him deposed unto at the time of his examination before A. Badeau, commissioner. Charles E. Lewis, witness: Said bonds were purchased of said Coler as part of a block of $453,500 of American municipal bonds, of which these
95 bonds formed $100,000; for said block of bonds it was agreed to pay said Coler $386,400. That of sum so agreed to be paid $250,000 was paid in cash, and the balance, $136,400, was paid in the certificates of the trust issued at par.

These bonds and coupons were purchased for the account of the Municipal Trust, which is not a corporation or company, but a private association formed under a deed of trust or settlement, of which association

plaintiff is the head or chairman, and by arrangement with his colle'gues on the executive committee all coupons needed to be put in suit are treated as placed in his sole hands as the legal holder and owner. Said deed of trust is in words and figures following, to wit:

The Municipal Trust.

Date. Parties. This indenture made the fifteenth day of December, 1873, between the Hon. Charles William Wentworth Fitzwilliam, M. P., Sir Sills John Gibbons, bart., John Gilbert Talbot, esq., M. P., and Richard Biddulph Martin, esq., banker, hereinafter called "the trustee" of the 1st part; Charles Edward Lewis, esq., M. P., chairman of a committee of certificate holders, Sir Harry Holyaake Goodricke, baronet, John Cook Hester, esq., Admiral William Windham Hornby, John Harry Evens, esq., Walter James Lord, esq., Edward Ross, esq., Granville Richard Dudley Ryder, esq., M. P., George Gammie Maitland, esq., and Henry Alexander Rudall, esq., hereinafter called "the committee" of the 2nd part;
96 and Henry Francis Gibb of Central Hill Upper Norwood, in the county of Surrey, a captain in the royal artillery and Charles Morgan, of Balham Hill, in the same county, merchant (hereinafter called "the covenantees"), for and on behalf of the holders for the time being of the certificates hereinafter mentioned of the 3rd part.

Recitals of formation of trust. Whereas subscriptions have been invited for the purpose of purchasing such securities as are hereinafter authorized, and by the prospectus inviting such subscriptions it was stated that a commission or charge of one and a half per cent. on the amount of capital was to be paid for preliminary expenses. And whereas, by the said prospectus (a print whereof is annexed to these presents and is intended to be incorporated therewith) it is stated that subscriptions may be paid in such securities as may come within the scope of the trust; and whereas certain subscriptions have been received in pursuance of such prospectus; and whereas it is intended to issue to the subscribers certificates in the forms set forth in the schedule hereto each holder of an A certificate being entitled to a B certificate for half the amount of such A certificate; and whereas to each of the said A certificates will be attached coupons for interest payable at the rate and in manner hereinafter mentioned; and whereas it hath been determined that the operation of the
97 trust hereby created shall be limited to the sum of £350,000:

Testatum. Now this indenture witnesseth that, for divers good considerations, the trustees and committee hereunto moving, they, the trustees and the committee do, and each of them doth, hereby covenant with the covenantees and the survivors his executors, administrators, and assigns, for and on behalf of all the holders for the time being of the said certificates in manner following:

Sums subscribed and interest to be held upon trust. 1. The said sum of £350,000, after deducting such percentage as aforesaid and the annual produce thereof, shall be held upon trust, and in manner and for the purposes hereinafter declared of and concerning the same.

Business of trust to be managed by a committee.

2. The business of the trust shall be managed by a committee of not less than four or more than twelve members, and the first committee shall consist of the parties hereto of the second part.

Meeting of trustees and committee.

3. The trustees and committee respectively may meet together for the despatch of business, adjourn and otherwise regulate their meetings as they may respectively think fit, and any three members of the committee, or as to the trustees any two trustees present at any meeting duly summoned shall form a quorum for the transaction of business. Two of the committee may at any time convene a meeting of the committee.

As to voting at meetings.

4. Question arising at any meeting, either of the committee or of the trustees, shall be decided by a majority
98 of vote of those present, and in case of an equality of votes the chairman shall have a second or casting vote. The votes at any general meeting of certificate holders shall be taken in accordance with clause 28 of these presents.

As to chairmen of trustees and committee.

5. The trustees and committee respectively shall elect a chairman of their meetings and determine the period for which he is to hold office; but if no such chairman be elected, or if at any meeting the chairman be not present at the time appointed for holding the same, the members present shall choose some one of their number to be chairman of such meeting.

As to appointment of subcommittee.

6. The committee may delegate any of their powers to subcommittees consisting of such members of their body as they may think fit. Any subcommittee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on them by the committee. The chairman of the committee shall ex-officio be a member and chairman of all subcommittees; but if he be not present at the time appointed for holding any subcommittee the members present shall choose one of their number to be chairman.

Minutes of meetings, accounts, &c., to be kept.

7. The committee and every subcommittee shall cause minutes to be made in books provided for the purpose of all their meetings and proceedings and shall keep proper accounts of all receipts and payments made by them
99 and of all matters proper to show the position of the trust securities.

As to investments in American municipal bonds and as to sales and reinvestments.

8. In their management of the business of the trust, the committee shall and may (subject only as hereinafter provided) without any further or other authority from the certificate holders invest and lay out at interest the available capital of the trust in American public municipal bonds, provided that not more than one-twentieth of the capital of the trust shall be invested at the same time in the securities of any one municipality. They may also sell out from time to time, if they shall so think fit, any of the securities in which from time to time the capital of the trust may be invested, and may reinvest the proceeds and any monies received from the payment off or redemption of any securities or otherwise howsoever in respect of any of the securities

hereinbefore mentioned without being in any way responsible for any loss arising from such change of securities.

Securities to be deposited with the trustees and by them deposited with the bankers.

9. All securities in which the capital of the trust may from time to time be invested shall be deposited in the hands of the trustees, in order that the same shall be by them deposited with the bankers of the trust, and such securities shall only be withdrawn from the custody of the trust ees by an order as hereinafter provided which order shall be first authorized by a resolution of the committee.

As to application of annual produce, &c.

100 10. The annual produce of such securities and of all moneys arising from the payment or redemption of any of such securities, shall subject as hereinafter mentioned be applied in manner following:

(1) In payment of expenses.

Firstly. In payment of all expenses properly incurred and in conformity with these presents.

(2) Interest on certificates.

Secondly. In payment of interest at 7 per cent. per annum on the amount of the A certificates to the holders thereof for the time being; such interest being payable quarterly on the 1st day of May, the 1st day of August, the 1st day of November, and the 1st day of February in every year, the first instalment thereof being payable on the 1st of May, 1874.

(3) Formation of reserved fund.

Thirdly. In formation of a reserve fund of such an amount as the committee may from time to time deem expedient.

(4) Redemption of certificates.

Fourthly. In the redemption at par of so many of the A and B certificates as the surplus moneys arising from such produce and profits aforesaid after allowing for such reserve fund shall be sufficient to redeem.

In case of insufficiency to pay interest division pari passu.

11. If in any year the annual produce of such securities and all moneys arising from the payment of redemption of any such securities shall after payment of all expenses be insufficient for the payment of interest at 7 per cent. per annum as aforesaid, on the amount of the A certificates, the avaliable moneys and any reserve fund shall be divided amongst the holders of the certificates pari passu

101 and the deficiency of such interest shall be paid in the next subsequent year or years as the case may require in priority to any other interest.

As to redemption of certificates by lot.

12. The certificates to be redeemed shall be determined by lot in the presence of a notary public, and a committee or a quorum thereof. The determination shall be made at such place as shall be directed by the committee in the months of February and August in each year or at such other times as the committee may determine, notice thereof being given in two London daily papers, one of which must be the Times, at least one week previously, and any holder of a certificate or his representative may attend. The first of such drawings shall take place in the month of February, 1875.

Result to be advertised, &c.

13. The members of the committee present on each such determination shall superintend the same and the result of each meeting for the purpose shall be recorded in a book, which shall be open for the inspection of the holders of certificates, and shall also be advertised as provided in clause 12, on the day following the actual drawing, or as near thereto as conveniently may be.

Declaration as to result of drawing.

14. If any holder of a certificate shall so require, the notary public present at such drawing shall make a statutory declaration of the result thereof.

Drawn certificates not to carry interest.

15. No certificate shall carry interest after it has been drawn for payment, whether its amount be demanded or received by its holder or not.

As to drawn certificates of which payment shall not be demanded.

16. If any holder of a certificate drawn for payment shall not demand and receive the amount thereof during twelve months succeeding such drawing, it shall be advertised with the advertisement of the next drawing, and if not then demanded before the then next drawing, the amount shall not be payable till the final division of the fund, but the holder of such certificate shall be otherwise treated in all respects as though he had received the amount thereof, and, notwithstanding the last proviso, the committee may by resolution declare that any sums unclaimed for three years after they shall have become payable to any certificate holder, and being unclaimed at the passing of such resolution, shall be forfeited to the trust estate, and this clause shall extend to coupons not presented for payment.

As to sums unclaimed for three years.

Holders of redeemed certificates to cease to participate in profits.

17. The holder of any certificate which shall be redeemed shall from the date of such redemption cease to have any right to participate in any future profits, or to have any further interest whatever in the trust estate, in respect of such certificate, which on redemption shall be delivered up to the committee to be cancelled.

When capital of the trust reduced to two-thirds, assets to be divided unless otherwise decided at a general meeting.

18. At such period as the capital of the trust estate shall have become reduced to two-thirds of the total amount that shall have been subscribed, the securities then forming the assets of the trust shall be realized by the committee, unless the certificate holders for the time being, by a resolution at a general meeting, shall otherwise decide, and the net proceeds thereof shall be divided between the holders of certificates, which shall not have been redeemed, in proportion to the value of the certificates held by them respectively.

Coupons for interest.

19. The committee shall attach to the A certificates coupons for the interest in the form given in the schedule to these presents, or in such other form as the committee may approve.

Interim investment of annual produce.

20. All annual produce and other devisable profits may, until the next time of distribution arrives, be invested in the purchase of exchequer bills or be placed on deposit in the names of the trustees for the time being at some London bank, and any interest arising from such interim investment shall be dealt with as part of the annual produce of the authorized securities.

Trustees to receive securities and deposit same with bankers.

21. The trustees shall receive from the committee all securities which the latter may hand to them for safe keeping, and shall immediately deposit the same in their names with Messrs. Martin & Co., Bankers, Lombard street, or with the Bank of England, or with the bankers of the trust for the time being, and shall only deliver the same pursuant to an order signed by at least three of the committee, and which order shall state that the same has been signed in pursuance a resolution of the committee, author

104 izing such delivery, and any such order purporting to be signed by any three of the committee shall be an absolute discharge to the trustees for any securities they may deliver thereunder, and they may deliver the same on such order without enquiring the purpose for which any securities may be required, or being concerned as to whether any resolution of the committee was passed in reference thereto or not; provided, however, that the trustees may, if they think fit, require to be satisfied as to the purpose for which the said securities are required, and if they are not satisfied therewith or approve thereof, may refuse to deliver up the same without the action of the certificate holders in general meeting.

As to re-delivery of same.

22. The trustees may, if they think fit, give the bankers of the trust a general authority to hand over any securities on such an order as aforesaid, and the trustees and the bankers shall be in no way responsible for any loss that may arise in consequence thereof. The bankers of the trust shall from time to time be nominated by the committee of certificates holders, and all cheques shall be signed by two of such committee and countersigned by the agents of the trust or by the secretary for the time being, and all monies received on account of the trust shall in the first instance be paid to such bankers to the credit of the trust, and all payments shall be made by cheques, as aforesaid.

Trustees may give general authority to bankers.

As to nomination of bankers from time to time and as to cheques.

23. The trustees shall not be concerned, or be bound

105 to enquire, whether all the securities of the trust shall be handed over to them, their duty being hereby expressly limited to receive and deposit in their own names at the bankers of the trust any securities that may be tendered to them by the committee, and to deliver the same on such an order, as aforesaid; this provision, however, being in no way intended to relieve the committee from the duty of at once handing over all securities to the trustees.

Trustees duly limited to receipt and deposit of securities.

24. Two books shall be kept by and at the expense of the trust, in which a detailed account shall be entered of all securities delivered to and given up by the trustees with the respective dates on which such receipts were delivered and surrendered respectively, and one of such books shall be retained by the trustees and one by the committee, and the latter book shall be at all times open to the inspection of any certificate holder at the office of the agents of the trust.

Record of securities delivered and surrendered.

25. The trustees shall be paid for their services out of the funds of the trust estate the annual sum of £50 each, and the committee an annual sum equivalent to one-fourth per cent. on the subscribed capital, payable half-yearly, the first payments respectively to commence at the expiration of six months from the date of these presents. The committee shall decide among themselves the proportion in which their remuneration shall be divided.

Remuneration to trustees and committee.

26. The working expenses of the trust shall be contracted for, and Messrs. Henry Alexander and George Rudall,

106 the originators of the trust, or others, the persons for the time being constituting the firm of Messrs. J. H. Rudall & Sons, or their nominees or successors, from time

The working expenses of the trust to be contracted for by Messrs. Rudall.

to time in their said business, so long as such firm or their nominees or successors respectively shall have a suitable place of business in the city of London, and shall faithfully and efficiently perform their duties, but not longer or otherwise, shall be the agents of the trust, and as such shall provide suitable offices for the business of the trust, including a committee room for the committee and trustees, and also an official staff of clerks, including a secretary, to take minutes of all meetings, and all stationery and other articles that may be required. They shall also conduct all correspondence as directed by the committee, prepare and send out at their own expense all necessary notices to the certificate holders, including in the latter all advertisements in the newspapers which the committee may direct them to insert, and generally do all such other acts, deed matters, and things as the committee may direct in the ordinary working of the trust, and shall without extra charge collect the coupons on all securities when due.

Particulars of matters included therein.

Remuneration to the agents.

27. In consideration of such services as aforesaid the said Messrs. Henry Alexander and George Rudall, or other, the agents for the time being, shall be paid an annual commission of one-half per cent. on the total amount of capital which shall have been subscribed. Such commis-
107 sion, to be paid quarterly, the first quarterly payment to be made at the expiration of three months from the date of these presents. If the said Messrs. Henry Alexander & George Rudall, or their successors as aforesaid, shall cease to be agents of the trust, the committee may make such other arrangements for the working of the trust by contract or otherwise as they may think fit, and any change in the address of the agents shall be advertised in two London newspapers.

Change in address of agents to be advertised.

Meetings of certificate holders.

28. The committee shall at least once in every year, by advertisement in some two public daily newspapers published in London, call together a meeting of the holders for the time being of the certificates, and at such meeting no person shall be present who does not produce his certificate, and persons shall vote in proportion to the value of the certificates produced by them; but in that and in all other respects the proceedings of any such meeting shall be conducted so far as may be in the manner prescribed in table A to the companies act, 1862, the holder of each A certificate of £50 being considered as holding an equivalent to one share, and of each £100 a certificate to two shares for the purpose of voting.

Business at such meetings.

29. The business of such meeting shall be—

(*a.*) To receive and consider reports from the trustees and committee on the condition and affairs of the trust.

(*b.*) To appoint auditors to audit the accounts of
108 the trustees and committee and to report to the next meeting of the holders of certificates.

(*c.*) To elect new trustees and members of the committee to supply any vacancies in those bodies.

(*d.*) To determine on any other matters in connection with the trust of which notice shall have been given by advertisement as aforesaid.

30. Each of the auditors shall receive such a sum, not exceeding £100 per annum, as may be determined from time to time by any general meeting of certificate holders. Remuneration to auditors.

31. If any person hereafter elected on the committee of certificate holders shall cease to hold five certificates he shall cease to be a member of such committee, and if the committee shall be reduced by any circumstances to less than four, the committee or trustee shall in manner aforesaid call a general meeting of the holders of certificates to fill the vacancies. Vacancies in committee, how filled up.

32. The committee shall meet whenever they shall think fit and whenever they shall be summoned by two members of the committee or by the trustees. Meetings of committee.

33. If the committee shall from the circumstances of the trust securities, or any of them, or otherwise, think it expedient for the interest of the holders for the time being of the certificates that any extraordinary expenses shall be incurred they may authorize such expenses to be incurred, and the agents or trustees may then incur the same accordingly. As to incurring extraordinary expenses.

34. Every receipt signed by two of the committee shall be an effectual discharge for the moneys therein expressed to be received and shall exonerate every person, company, or corporation, paying the same form seeing to the application thereof, or being answerable for the loss, misapplication or non-application thereof. As to receipts signed by any two of the committee.

35. Every trustee and member of the committee, auditor, agent, or other officer, and his heirs, executors, administrators, and assigns, shall be indemnified by and out of the trust fund in respect of all losses and expenses incurred by them respectively, in or about the discharge of their respective duties, except such as may happen from their own respective wilful acts or defaults. Indemnity to trustees and others.

36. If the persons, parties hereto of the 1st or 2nd parts, or any of them, or any trustees, or trustee, or members, or member of the committee appointed as hereinafter provided, shall die or become incapable to act, or shall retire from the trusts hereof, then and in every such case it shall be lawful for a general meeting of the certificate holders by resolutions to appoint a new trustee or new trustees, or a new member or members of the committee, as the case may be, in the place of the late trustee or trustees, or members or member of the committee, and upon every such appointment all the securities, subject to the trusts hereof, shall be delivered into the custody as aforesaid of such new trustee or trustees jointly with the continuing trustees. Every trustee and member of the committee respectively so appointed as aforesaid, shall, in all respects, act and be responsible as if he had been named as a trustee or member of the committee in this deed. Any temporary vacancy in the committee shall be filled up by the remaining members of the committee, but any such appointment shall be submitted for confirmation to the next general meeting of certificate holders. As to the committee it shall be imperative to fill up vacancies unless the number shall be reduced to less than four. As to filling up vacancies in the trustees or committee.

New trustees and members of committee to execute covenant.

37. Every such new trustee and member of the committee respectively, shall, if required, at the cost and expense of the trust fund, as one of its ordinary expenses, enter into a covenant with a covenantee or covenantees to be named by the committee of certificate holders for the time being, to the same effect as herein contained.

As to execution of covenant with new covenantees.

38. In the event of any general meeting of certificate holders so requiring, the trustees and committee respectively for the time being shall at the cost and expense of the trust fund, as one of its ordinary expenses, enter into a similar deed to these presents with a new covenantee or covenantees to be named by the said general meeting of certificate holders.

Indemnity clause.

39. The trustees and committee respectively shall not be under any obligation, under any circumstances, to
111 sell, call in, or convert into money any of the securities, or to take any proceedings for the purpose or recovering or enforcing payment of any securities, or of the dividends or interest payable thereon, and the trustees or trustee and the committee for the time being shall be respectively chargeable only for such moneys, stocks, funds, and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and each shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker or other persons with whom any securities or moneys may be deposited, nor for the safe custody of the trust securities or moneys deposited with or received by the bankers of the trust nor for the insufficiency, deficiency, or invalidity of any securities, stocks or funds, nor for any other loss unless the same shall happen through his own wilful default respectively, and the trustees and members of the committee respectively shall be entitled to deduct and retain out of the trust funds all expenses sustained or properly incurred by them and not hereinbefore expressly provided for, in carrying into effect the trusts of these presents.

Alteration of these presents.

40. The majority of the certificate holders present at any meeting to be convened by the trustees or the committee, of which at least 7 days' notice specifying the object
112 of the meeting shall have been given by advertisement as aforesaid, may alter, vary, or amend any of the provisions hereof, save only the provisions of clauses 25, 26, & 27.

In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

CHARLES W. WENTWORTH FITZWILLIAM, [L. S.]
SILLS. JNO. GIBBONS, [L. S.]
JOHN G. TALBOT, [L. S.]
RICHARD B. MARTIN, [L. S.]
Trustees.

H. F. GIBB, [L. S.]
CHAS. MORGAN, [L. S.]
Covenantees.

CHARLES E. LEWIS, [L. S.]
H. H. GOODRICKE, [L. S.]
J. C. HESTER, [L. S.]
W. W. HORNBY, [L. S.]
JOHN H. EVENS, [L. S.]
WALTER J. LORD, [L. S.]
E. ROSS, [L. S.]
GRANVILLE R. RYDER, [L. S.]
G. G. MAITLAND, [L. S.]
H. A. RUDALL, [L. S.]
Committee.

Signed, sealed and delivered by all the above-named parties in the presence of—

J. W. BILLINGHURST,
Solicitor, 7 Bucklersbury.

The schedule referred to in the foregoing deed.

FORM OF A—CERTIFICATE.

No.—.

THE MUNICIPAL TRUST.

A—CERTIFICATE.

First issue, 1873.

£100.

This is to certify that the holder of this certificate is entitled to the sum of £100, part of the securities included in the capital of £350,000, less one and a half per cent. forming the Municipal Trust, and to
113 all the benefits secured to the holders of A certificates by a certain trust deed regulating the management of the said trust bearing date the 15th day of December, 1873. Dated the 25th day of April, 1874.

Agents to the trust:

Two of the members of the committee of certificate holders.

Entered.

Form of coupon to be attached to the A certificates.

THE MUNICIPAL TRUST.

No. . £100.

Coupon for three months' interest, £1 15*s.* 0*d.* due 18 , payable at Messrs. J. H. Rudall & Sons, 20 King William street, London.

Form of B certificate.

No. —.

THE MUNICIPAL TRUST.

B CERTIFICATE.

First issue, 1873.

£50.

This is to certify that the holder of this certificate is entitled to the sum of £50 by way of bonus or addition on payment of an A certificate similarly numbered for £100, part of the securities included in the capital of $350,000 (less one and a half per cent.) forming the municipal trust, and to all the benefits secured to the holders of B
114 certificates by a certain trust deed regulating the management of the said trust, bearing date the 15th day of December, 1873.

Dated the 25th day of April, 1874.

Agents to the trust:

Two of the members of the committee of certificate holders.

Entered.

No. 1501, dated the 15th day of December, 1873.

Lewis vs. Barbour Co. The Municipal Trust. Agreed evidence (copy trust deed, with form of certificate annexed).

It is hereby agreed that the foregoing is a true copy of the indenture of trust & the certificates and coupons thereto attached of the Municipal Trust, of which Charles E. Lewis is chairman of the committee, and referred to by said Lewis in his deposition heretofore taken herein, and that the same may be received in evidence in the case of Lewis vs. Barbour County, in the U. S. circuit court district of Kansas, the same as though duly proven by and attached to a deposition taken to introduce the same.

E. STILLINGS,
One of the Att'ys for Def't.
GRANT & GRANT,
for Pl'ff.

Filed June 11, 1880.

A. S. THOMAS, *Clerk*,
By J. N. STRICKLER, *Deputy*.

Billinghurst & Wood, 7 Bucklersbury, London.

115 Said certificates are transferable from hand to hand, and they and the interest certificates attached thereto payable to bearer.

The $136,400 of certificates of said Municipal Trust paid to said Coler, as part consideration of said block of bonds, were in form following, to wit:

Certificate.

The schedule referred to in the foregoing deed.

Form of A certificate.

No. .

THE MUNICIPAL TRUST.

First issue 1873.

£100.

This is to certify that the holder of this certificate is entitled to the sum of £100, part of the securities included in the capital of £350,000, less one and a half per cent., forming The Municipal Trust, and to all the benefits secured to the holders of "A" certificates by a certain trust deed regulating the management of the said trust, bearing date the 15th day of December, 1873.

Dated the 25 day of April, 1874.

Agents to the trust:

Two of the members of the committee of certificate holders.

Entered.

Form of coupon to be attached to the A certificates.

No. THE MUNICIPAL TRUST. £100.

116 Coupon for three months' interest £1 15*s.* 0*d.*, due 18 , payable at Messrs. J. H. Rudall & Sons, 20 King William street, London.

Form of B certificate.

No. .

THE MUNICIPAL TRUST B CERTIFICATE.

First issue, 1873.

£50.

This is to certify that the holder of this certificate is entitled to the sum of £50, by way of bonus or addition, on payment of an A certificate similarly numbered for £100, part of the securities included in the capital of $350,000 (less one and a half per cent.), forming The Municipal Trust, and to all the benefits secured to the holders of B certificates by a certain trust deed regulating the management of the said trust, bearing date the 15th day of December, 1873.

Dated the 25th day of April, 1874.

Agents to the trust.

Two of the members of the committee of certificate holders.

Entered.

Said bonds were delivered by said Coler to the trust—
April 30, '74, $30.00.

May 13, " 50.00.
June 4, " 20.00, and paid for on delivery, as above stated.

(Coler is insolvent, and gone through bankruptcy.)

Def't.

117 That on the 27th of August, '73, the proposition to vote $100,000, as a donation to the N. K. & I. W. R. R., and issue $100,000 in bonds on 30 years' time, in payment of said donation, said bonds to be placed in escrow with State treasurer, and 50,000 of them to be delivered to the R. R. Co. when the R. R. should be completed to Medicine Lodge, and 50,000 more when completed through Barbour County, was duly submitted to the voters of Barbour Co., and the proposition duly carried. No part of the road was ever made, and no work was ever done on the road.

The bonds and coupons disclosed in the petition were signed and sealed by the chairman and clerk of the board of county commissioners of Barbour County, and by order of the board, at a meeting held by them at Hutchinson, in Reno County, and left with one Hutchinson to be deposited with the State treasurer, as was required by the submission to the people of Barbour County, and the bonds were never deposited with the treasurer of State, but were procured to be registered by the said Hutchinson by the auditor of the State of Kansas, which registration is endorsed upon each of said bonds, and is in words and figures following, to wit:

STATE OF KANSAS, *ss:*

I, D. W. Wilder, auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine, and that the same has been duly regis-
118 tered in my office according to law.

In witness whereof I have hereunto set my hand and affixed my seal of office, at the city of Topeka, this 19th day of November, 1873.

D. W. WILDER,
Auditor.

And then fraudulently put in circulation.

The records of the board of county commissioners show said bonds to have been signed in accordance with the vote to run 20 years and bear 10 per cent. interest. These records were made up before the signing of the bonds from slips of paper, but said records were not made up in accordance with the truth, and was wholly false.

The purchase of these bonds and coupons was made by the plaintiff as agent for the Municipal Trust, and they were paid for by the said trust, as before stated.

The certificates issued by said trust above set out are the same as all other certificates issued by the owners of shares in said trust, and represent the capital of said trust, which is $1,150,000. It is admitted that the plaintiff testified that on the 30th day of October, 1875, he lent the said Municipal Trust the sum of 1,500 pounds sterling, and on the 9th day of November, 1875, the further sum of 600 pounds sterling of his own monies, upon the security of a deposit of the coupons from the said bonds on which this suit is brought, and other similar coupons, and he claims, as the money is still unpaid to the extent of 1,400
119 pounds sterling and upwards, that he is the sole holder and owner of such coupons in his own right.

There was no assessment-roll in said county in the years 1873 & 1874, and the assessment-roll of 1875 was only the sum of $68,000.

That in 1873 the county was first organized and contained but few inhabitants, and that only 127 votes were cast upon the proposition to issue the bonds in controversy.

That at the date of purchasing these bonds said Coler furnished to the plaintiff a certificate signed by the board of county commissioners and clerk of Barbour county, dated Nov. 6, 1873, wherein it is stated among other things that the number of inhabitants in said county was about 3,800 and the amount of taxable property exceeds $1,000,000, and such statement was wholly false.

A jury is waived and the case submitted to the court on the foregoing facts.

GRANT & GRANT,
Attorney for Pl'ff.
E. STILLINGS,
THOS. P. FENLON,
Att'y for Def't.

(Endorsed:) 1501. Lewis vs. Barbour Co. Agreed facts & record. Filed June 11, 1880. A. S. Thomas, clerk, by J. N. Strickler, deputy.

120, 121 *Opinion.*

In the circuit court of the United States, district of Kansas, June term 1880.

CHARLES E. LEWIS
vs.
THE BOARD OF COUNTY COMMISSIONERS OF BARBOUR COUNTY.

MCCRARY, circuit judge:

This is an action brought to recover judgment upon certain municipal bonds issued by the authorities of Barbour County, Kansas. By agreement of the parties a jury has been waived and the cause submitted to the court upon an agreed statement of facts. The defense is that the bonds were fraudulently issued and that the plaintiff is not a bona fide holder for value. The agreed statement shows, and counsel for plaintiff admit, that the bonds were fraudulently issued, so that the only question for determination is as to whether the plaintiff is a bona fide purchaser without notice. The bonds upon their face purport to have been issued under the provisions of an act of the legislature of Kansas entitled "An act to authorize counties, incorporated cities and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water powers, and other works of internal improvements, and providing for the registration of such bonds, &c., (laws of 1872, chap. 68, p. 110.) The eleventh section of the act is as follows:

"SEC. 11. That if the proposition for which bonds were voted be to aid in the construction of a railroad, or any bridge, or other work of internal improvement, either by donations thereto or the taking of stock therein, then upon the subscription being made therefor as hereinbefore provided, the officers of such county, city or township, shall there-
122 upon issue the bonds of said county, city, or township for the amount of such subscription, and shall forthwith deliver the same together with the original, or a copy of the subscription setting forth its

terms in full to the treasurer of State, which said bonds shall be held by the said treasurer of State in escrow until the conditions of said subscription to such railroad or other work of internal improvement shall be in all things fully complied with: that upon the conditions of the said subscription being in all things fully complied with, then the treasurer of State shall deliver such bonds to the parties entitled thereto, who shall have the same registered as hereinafter provided: Provided that such bonds shall not bear interest or be negotiable until after the delivery and registration thereof; and provided further, that in case of failure to comply with *in* terms of such subscription then such bonds shall be by said treasurer of State cancelled and redelivered to the county, city, or township issuing the bonds; and provided further that this section shall not apply where the people may have named some party as trustee in their vote upon the proposition, and the contractor may thereafter agree to the same."

The meaning of this section is plain; it was intended to protect the tax of the counties in Kansas against an unauthorized or fraudulent issue of bonds under the act without a compliance with its provisions. Prior to its passage the law had been settled that in the absence of legislation to the contrary, bonds purporting on their face to have been issued and delivered by the authorities of a county in pursuance of law operated in the hands of a bona fide purchaser to estop the county from denying their validity.

The legislature of Kansas undertook to provide, by law, certain safeguards against fraud. These are set out in the act above mentioned.

All such bonds were to be delivered to the treasurer of State to
123 be held by him in escrow, until the terms of *of* subscription should be fully complied with, and upon such compliance to be by him delivered to the parties entitled thereto. Such delivery to the treasurer is made by act a condition precedent to the negotiability of the bonds. The proviso declares that such bonds shall not bear interest or be negotiable until after the delivery and registration thereof. The agreed statement shows that the bonds in question were by the terms of the subscription to be placed in the hands of the treasurer of State in escrow, to be delivered, $50,000 when the railroad subscribed to should be completed to Medicine Lodge, and $50,000 when through the county; that no part of the railroad was ever built; that the bonds were not delivered to the treasurer, but to one Hutchinson, who procured their registration by the auditor of State and fraudulently put them in circulation. They were never in the hands of the treasurer of State, and were of course never delivered by him. If therefore the statutory provision above quoted is to have the force and effect evidently intended by the legislature the bonds must be held non-negotiable and bad in the hands of the plaintiff, but it is strongly urged by the counsel for plaintiff that the county is estopped to deny the negotiability of the bonds, because they appear on their face to be negotiable and purport to be issued in accordance with the statute. I suppose it is competent for the legislature of a State to prescribe such conditions as it may deem proper with respect to the negotiability of any bonds it may authorize a municipality to issue. It may provide that such bonds shall not be negotiable at all, and if so why may it not also provide that they shall be negotiable only upon condition that they pass through the hands of the treasurer of State and are by him delivered. This imposes upon the purchaser only the duty of examining the records of a public office,

or of inquiring for information of a public officer, to ascertain the
124 fact. The *or*thorities are uniform that such a purchaser must

take notice of the terms of the statute under which bonds are issued, as if the same were set out in full on the face of the bonds. In delivering the unanimous opinion of the Supreme Court in McClure vs. Township of Oxford (4 Otto, 429), Mr. Chief Justice Waite said: "To be a bona fide holder one must be himself a purchaser for value without notice, or the successor of one who was; every man is *is* charg'able with notice of that which the law requires him to know, and of that which, after being put upon inquiry, he might have ascertained by the exercise of reasonable diligence. Every dealer in municipal bonds which upon their face refer to the statute under which they were issued is bound to take notice of the statute and of all requirements."

True, the purchaser may presume compliance with such provisions of the statute as relate to the manner of exercising powers conferred by law upon officers of the county. If the power *is* to issue the bonds exists in law, and the bonds recite a compliance with it, the recital is conclusive (Orleans vs. Platt, 9 Otto, 362). But this doctrine applies to negotiable instruments having the property of commercial paper. It has never been extended to a case like the present, where by the terms of the statute the instrument is declared not negotiable delivered to the treasurer of State and by him to the party entitled thereto. If this provision is to be regarded as incorporated in the bonds, then how can it be said that the instruments are negotiable on their face. If we are to read the statute as a part of each bond, then they appear on their face to be negotiable only upon the condition named in the act. If a corporation should issue a bond negotiable only when countersigned by its president, no lawyer would doubt that a purchaser would take it at his own peril if not so countersigned. It is difficult to discourse the
125 difference between such a case and one where the bond appears by its terms to be negotiable only upon the condition that it shall pass through the hands of a State officer and be by him delivered. If it appeared in this case that the bonds were delivered to the treasurer of State an' by him to an innocent purchaser, I am not prepared to say that this would not be a sufficient protection to the holder even if the delivery had been wrongful. The decision of the treasurer upon the question of compliance with the terms of the subscription would, I think, estop the county, for the county made him its agent for the purpose of deciding that question; but since it appears that the bonds were never delivered to the treasurer, and that the purchaser might have ascertained that fact by an enquiry addressed to that official, I am of the opinion that he purchased at his peril. To hold otherwise would be to nullify the statute which was passed for the very purpose of providing certain safeguards against the fraudulent issue of bonds by agents of the county. If the statute is construed so as to permit such agents to estop the county by such fraudulent issue the statute is without validity. I think the statute is notice to the purchaser of bonds issued under its provisions that such bonds are not negotiable unless delivered through the treasurer of State, and that such purchasers must make inquiry as to the fact or purchase at their own risk. The bonds were not negotiated by the agent authorized by law, to wit, the treasurer of State. If that official had negotiated them the bona fide holder might, as already suggested, be protected upon the ground that the treasurer was presumably performing his duty, and the purchaser had the right to rely upon that presumption, but these bonds were negotiated by a stranger, having no official relation to the county; whoever buys
126 under such circumstances must enquire as to whether the treasurer of State has delivered the bonds. The law constituted

the treasurer of State the agent of the county for the purpose of issuing these bonds, and made their negotiability dependent upon the condition precedent of delivery by him. If he had performed this duty, if he had acted as agent, however irregular or even unlawful his action, the county might be estopped. But not so where he did not act at all and the bonds were set afloat by the fraudulent act of another; no representations by a pretended agent can ever establish the fact or extent of agency. If Hutchinson represented that he was authorized to negotiate the bonds, he could not thereby bind the county. The agent for the county for the purpose was named by law as well as by the act of the county, and there was no excuse for accepting without inquiry as final the statements of any other person. (New York Life Insurance and Trust Co. vs. Beebe, 3 Selden, 364.) The plain mea'ing of the statute is that the bonds are not be regarded as issued until delivered under the act by the treasurer of State. Until so delivered they are in escrow, and of this the public has notice in the terms of the law itself. In Chisholm vs. City of Montgomery, 2 Woods, 594–5, Mr. Justice Bradley said: "The plea that the city is estopped by the act of its officers, by the resolutions of the city counsil, or by the negotiable form or other matter in the bonds themselves, from denying the authority of such officers to pledge the faith of the city in aid of said plank roads, and to issue the bonds in question cannot be maintained. Public officers cannot acquire authority by declaring that they have it. They cannot thus shut the mouth of the public whom they represent.

127 The officers and agents of private corporations entrusted by them with the management of their own business and property may estop their principals and subject them to the consequenses of their unauthorized acts, but the body politic cannot be thus silenced by the acts or declarations of its agents. If it could be, unbounded scope would be given peculations and frauds of public officers. I hold it to be a sound proposition that no municipal or political body can be estopped by the acts or declarations of its officers from denying their authority to bind it. (The Floyd acceptances, 7 Wall., 666.)

"Finally, the plaintiffs are bona fide holders of the bonds cannot avail where the defense is want of power to issue them. Of this defect the plaintiffs were bound to take notice. Had the power to issue the bonds existed, and had the question been whether certain preliminary conditions had been complied with the plea might under certain circumstances have been a good one." If this is the law where an officer of the corporation has exceeded his power, it is the law applied to the present case, where who was authorized did not act all, and an outsider for purposes of fraud undertook to do so. The conclusion reached renders unnecessary any consideration of the questions discussed by counsel. Judgment for defendants.

Grant and Grant for pl'ff.

Edward Stilling, Thomas P. Fenlon for def'ts.

(Endorsed:) No. 1501. Chas. Lewis vs. Board of County Commissioners of Barbour County. Opinion. Filed July 23, 1880. A. S. Thomas, clerk. McCrary, circuit judge.

128 And on this day, to wit, September 10, 1880, there was filed in the clerk's office in said entitled action special findings, which said special findings are in the words and figures following, to wit:

Special findings.

In United States circuit court in and for the district of Kansas.

CHARLES E. LEWIS
vs.
THE BOARD OF COUNTY COMMISSIONERS OF the county of Barbour. } No. 1501.

Special findings by the court.

The court finds as the facts in this case: It is admitted in this case that this suit is being brought to recover upon 100 bonds alleged to have been issued by Barbour County commissioners, dated September 1st, 1873, the coupons thereon due September 1, 1875, amounting to $5,000; those due March 1st, 1876, for $5,000, and those due September 1st, 1876, for $5,000. Copy of one of which bonds and coupons is inserted in the agreed facts herein (and appears in full on pages 81, 82 & 83 of this record).

It is admitted in this case that the plaintiff, as hereinafter designated, purchased the bonds and coupons sued on in this action before the
129 maturity of any of said coupons, and without notice of any fraud committed in the alleged execution and issue thereof, unless the facts hereinafter stated shall be held to be notice.

The said plaintiff purchased said bonds and coupons of one W. N. Coler, under an agreement with said Coler, a copy of which agreement is inserted in said agreed facts (and appears in full on pages 84 to 91 of this record).

Said bonds were purchased of said Coler as part of a block of $453,500 of American municipal bonds, of which these bonds formed $100,000. For said block of bonds it was agreed to pay said Coler $386,400; that of said sum so agreed to be paid $250,000 was paid in cash, and the balance, $136,400, was paid in the certificates of the trust issued at par. These bonds and coupons were purchased for the account of the Municipal Trust, which is not a corporation or company, but a private association formed under a deed of trust or settlement, of which association plaintiff is the head as chairman, and by arrangement with his col-
130 leagues on the executive committee all coupons needed to be put in suit are treated as placed in his sole hands as the legal holder and owner. A copy of said deed of trust is inserted in said agreed facts (and appear in full on pages 95 to 113 of this record).

Said certificates are transferrable from hand to hand, and they and the interest certificates attached thereto payable to bearer.

The $136,400 of certificates of said Municipal Trust paid to said Coler as part consideration of said block of bonds were in form as the copy set out in agreed facts (and appears in full on page 115 of this record).

Said bonds were delivered by said Coler to the trust April 30, 1874, $30,000; May 13, 1874, $50,000; June 4th, 1874, $20,000; and paid for on delivery.

That Coler is insolvent and has gone through bankruptcy.

That on August 27th, 1873, the proposition to vote $100,000 a donation to the Nebraska, Kansas & Southwestern R. R., and issue $100,000 in bonds on 30 years' time in payment of said donation bonds,
131 to be placed in escrow with State treasurer and $50,000 of them to be delivered to the railroad company when the railroad should be completed to Medicine Lodge, and $50,000 more when completed

through Barbour County, was duly submitted to the voters of Barbour County and the proposition duly carried. No part of the road was ever made, & no work ever done on the road. The bonds and coupons disclosed in the petition were signed and sealed by the chairman and clerk of the board of county commissioners of Barbour County, and by order of the board, at a meeting held by them in Hutchinson, in Reno County, & left with one Hutchinson to be deposited with the State treasurer, as was required by the submission to the people of Barbour County, and the bonds were never deposited with the treasurer of State, but were procured to be registered by the said Hutchinson by the auditor of the State of Kansas, which registration is endorsed upon each of said bonds, and a copy thereof is set out in the agreed facts, and then fraudulently put in circulation.

132 The records of the board of county commissioners show said bonds to have been signed in accordance with the vote to run 20 years and bear 10 per cent. interest. These records were made up before the signing of the bonds from slips of paper, but said records were not made up in accordance with the truth, and was wholly false. The purchase of these bonds and coupons was made by the plaintiff as agent for the municipal trust, and they were paid for by the said trust as before stated. The certificates issued by said trust above set out are the same as all other certificates issued to the owners of shares in said trust, and represent the capital of said trust, which is $1,150,000.

It is admitted that the plaintiff testified "that on the 30th day of October, 1875, he lent the said municipal trust the sum of 1,500 pounds sterling, and on the 9th day of November, 1875, the further sum of 600 pounds sterling of his own monies, upon the security of a deposit of the coupons from said bonds on which this suit is brought and other similar coupons, and he claims, as the money is still unpaid to the ex-

133 tent of 1,400 pounds sterling and upwards, that he is the sole holder and owner of such coupons in his own right."

That in 1873 and 1874 there was no assessment roll in said county, and in 1875 the assessment roll was only the sum of $68,000.

That in 1873 the county was first organized and contained but few inhabitants, and that only 127 votes were cast upon the proposition to issue the bonds in controversy. That at the date of purchasing these bonds said Coler furnished to the plaintiff a certificate signed by the board of county commissioners and clerk of Barbour County, dated November 6th, 1873, wherein it is stated among other things that the number of inhabitants in said county was about 3,800, and the amount of taxable property exceeded one million; that such statement was wholly false.

GEO. W. McCRARY,
Circuit Judge.

SEPT. 8, 1880.

(Endorsed:) No. 1501. Charles E. Lewis vs. The Board of County Commissioners of the county of Barbour. Special findings. Filed Sept. 10, 1880. A. S. Thomas, clerk.

134 And on this day, to wit, October 12, 1880, in the June term of said court, in the record of the proceedings thereof in said entitled action, is the following entry, to wit:

Judgment.

CHARLES E. LEWIS, PLAINTIFF,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF Barbour County, Kansas, defendant. } 1501.

Now comes the plaintiff herein by Grant & Grant, his attorneys, and the defendant by Stillings & Fenlon, his attorneys, and the parties hereto by their attorneys having waived a jury by written stipulation filed herein, and submitted this action and the premises to the court upon an agreed statement of facts filed herein, and thereupon the court having considered the said evidence adduced and arguments of counsel, now files its special findings of fact and find for the defendant. It is therefore now by the court here considered, ordered, and adjudged that said defendant herein go hence without day, and have and recover of and from said plaintiff, Charles E. Lewis, its costs herein expended, and that execution issue therefor, to all which conclusions & judgment plaintiff at the time duly excepted,

135 *Bond.*

Know all men by these presents, that we, Charles E. Lewis, as principal, and James Thompson & T. T. Dorr, as sureties, acknowledge ourselves indebted unto the county of Barbour, State of Kansas, in the penal sum of five hundred dollars lawful money of the United States, to the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals and dated this 11th day of October, A. D. 1880.

Whereas, at the October adjourned term, 1880, of the circuit court of the United States, held in the district of Kansas, a judgment was rendered in said court in favor of the county of Barbour and against Charles E. Lewis for costs; and whereas the said Charles E. Lewis is about to sue out a writ of error from the Supreme Court of the United States to reverses said judgment:

Now, therefore, the condition of this obligation is such that if the said Charles E. Lewis shall prosecute said writ of error to effect, and if he fail to make his plea good shall answer all costs, then this obligation shall be void; otherwise to remain in full force and virtue.

In witness whereof we hereunto set our hands & seals the day and year last above written.

CHARLES E. LEWIS,
136 By GRANT & GRANT, *Att'y's.*
JAMES THOMPSON.
T. T. DORR.

Approved.

C. G. FOSTER, *Judge.*

STATE OF IOWA,
Scott County, ss:

We, James Thompson & T. T. Dorr, being duly sworn, say, each for himself, that he is worth the sum of five hundred dollars over and above all just debts, liabilities, and exemptions.

JAMES THOMPSON.
T. T. DORR.

Subscribed and sworn to before me by James Thompson & T. T. Dorr, this 11th day of October, A. D. 1880.

[SEAL.] WHITAKER M. GRANT,
Notary Public.

STATE OF IOWA,
Scott County:

I, J. Andrews, clerk of the district court of Iowa, in and for said county, do hereby certify the within bond to be good, and the sureties ample for ten thousand dollars, and the same would be accepted by me if offered in a court of which I am clerk.

Witness my hand and official seal this 11th day of October, 1880.

[SEAL.] J. ANDREWS,
Clerk D. C.

(Endorsed:) No. 1501. Chas. E. Lewis vs. Barbour County. Bond on writ of error. Filed Oct. 13, 1880. A. S. Thomas, clerk.

137 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full and perfect copy from the record of all the proceedings in the action of Charles E. Lewis vs. The Board of County Commissioners of the county of Barbour, No. 1501, in said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said district of Kansas, this 21 day of January, A. D. 1881.

[SEAL.] A. S. THOMAS, *Clerk,*
By W. W. GELATT, *Deputy.*

138 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the circuit court of the United States in and for the district of Kansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between Charles E. Lewis and the Board of County Commissioners of the County of Barbour, No. 1501, in said court, a manifest error hath happened to the great damage of the said Charles E. Lewis, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States of America, together with this writ, so that you have the same at Washington on the second Monday in October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further therein to be done to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 13 day of Oct., A. D. 1880.

[SEAL.] A. S. THOMAS,
Clk U. S. Cir. Court, District of Kansas.

(Indorsed:) No. 1501. No. . C. E. Lewis vs. Barbour County. Writ of error. Filed Oct. 13, 1880. A. S. Thomas, clerk.

Allowed.

C. G. FOSTER, *Judge.*

139 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Board of County Commissioners of the County of Barbour:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the district of Kansas, wherein Charles E. Lewis is plaintiff in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable C. G. Foster, judge of said court, this 13 day of October, 1880.

[SEAL.] C. G. FOSTER, *Judge.*

140 (Indorsed:) No. 1501. Charles E. Lewis, plaintiff in error, vs. Board of County Commissioners of the County of Barbour, defendant in error. Citation. Filed Oct. 29, 1880. A. S. Thomas, clerk.

Due service of this citation is admitted.
Oct. 28th, 1880.

E. STILLINGS,
Att'y for Defendants in Error.

141 Supreme Court of the United States.—Oct. term, 1880.

CHARLES E. LEWIS, PL'FF IN ERROR,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF Barbour County, def't in error. } No. 1167.

Whereas the transcript in this case contains a copy of the petition filed in the case, and it contains a separate count on each coupon included in the suit, and the said separate counts are contained in said transcript, from about pages 5 to 54 inclusive, the only difference in said counts being the numbers of the bonds and the dates when the coupons are due, it is therefore agreed that in having said transcript printed the clerk of the court may have the first part of said petition, with one or two of said separate counts printed & the balance of said separate counts left out, with sufficient reference being made thereto to explain the same, and the same may stand as the printed record in the case.

JAMES GRANT,
Counsel for Pl'ff in Error.
E. STILLINGS,
THOS. P. FENLON, &
A. M. F. RANDOLPH,
For Def't.

142 (Endorsed:) Supreme Court U. S. 1880, October term. No. 1167. Charles F. Lewis, plff. in error, vs. The Board of County Commissioners of the County of Barbour. Stipulation to omit certain parts of record in printing. Filed 1 April, 1881.

(Indorsement on cover:) No. 1167. Charles E. Lewis, plaintiff in error, vs. The Board of County Commissioners of the County of Barbour. Kansas C. C. U. S. Filed 19th March, 1881.

SUPREME COURT OF THE UNITED STATES.

No. 819.

OCTOBER TERM, 1881.

CHARLES E. LEWIS, PLAINTIFF IN ERROR,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BARBOUR, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF KANSAS.

ARGUMENT FOR PLAINTIFF IN ERROR, BY JAMES GRANT AND WHIT. M. GRANT.

FILED, , 1881.

(Endorsed:) Supreme Court U. S. 1880, October term. No. 1167. Charles E. Lewis, plff. in error, vs. The Board of County Commissioners of the County of Barbour. Stipulation to omit certain parts of record in printing. Filed 1 April, 1881.

(Indorsement on cover:) No. 1167. Charles E. Lewis, plaintiff in error, vs. The Board of County Commissioners of the County of Barbour. Kansas C. C. U. S. Filed 19th March, 1881.

SUPREME COURT OF THE UNITED STATES.

No. 819.

OCTOBER TERM, 1881.

CHARLES E. LEWIS, PLAINTIFF IN ERROR,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BARBOUR, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF KANSAS.

ARGUMENT FOR PLAINTIFF IN ERROR, BY JAMES GRANT AND WHIT. M. GRANT.

FILED, , 1881.

In the Supreme Court of the United States.

No. 819.

CHARLES E. LEWIS,
Plaintiff in Error,
vs.
THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BARBOUR,
Defendant in Error.

Argument for Plaintiff in Error, by James Grant & Whit. M. Grant.

STATEMENT OF THE CASE.

The plaintiff in error, Charles E. Lewis, a citizen and resident of London, England, filed his petition in the Circuit Court of the United States, District of Kansas, seeking to recover of the defendant in error upon three installments of coupons due September 1, 1875, March 1, 1876, and September 1, 1876, (there is only one count, September 1, 1875, in the petition; the others put in by amendment for that purpose only, by agreement, and not included in transcript) from bonds of Barbour County bearing date September 1, 1873, signed by S. H. Ulmer, its presiding Justice, attested by M. D. Houk, its Clerk, with its corporate seal attached, whereby it acknowledged itself indebted and bound to pay the Nebraska, Kansas & South-

western Railroad Company, or bearer, $1,000 each, at the National Park Bank, in the City of New York, on September 1, 1893, (misprinted in transcript 1873) with interest from date at the rate of 10 per cent. per annum, payable to bearer semi-annually, March and September 1, at said bank, as per coupons attached.

Said bonds recite that they were issued in pursuance of an act of the Legislature of the State of Kansas, entitled "An act to authorize counties, incorporated cities and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water power or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith." Approved March 2, 1872. That said bonds were duly registered in the office of the Auditor of the State of Kansas on November 19, 1873, and that said bonds were duly authorized by a vote of the people, as provided by law. (Record, p. 1.)

A copy of one of said bonds is attached to said petition and is as follows:

EXHIBIT "A."

"UNITED STATES OF AMERICA.

NUMBER 1. TWENTY YEARS.

BARBOUR COUNTY RAILROAD BOND.

BARBOUR COUNTY. STATE OF KANSAS.

"Twenty years after date, Barbour County, in the State of Kansas, for value received, promises to pay to the Nebraska, Kansas & Southwestern Railroad Company, or bearer, the sum of *One Thousand Dollars*, with interest thereon from date at 10 per cent. per annum, payable semi-annually on the first days of March and September of each

year, upon the presentation and surrender as they severally become due of the proper coupons 'therefore,' hereunto attached. Both principal and interest payable at the National Park Bank in the City and State of New York, without relief from valuation or appraisement laws.

"This bond is one of a series of one hundred bonds of one thousand dollars each, all of like tenor and date, and numbered consecutively one to one hundred, issued for the purpose of aiding in the construction of the Nebraska, Kansas & Southwestern Railroad through said Barbour County, in the State of Kansas, under and in pursuance of an act the Legislature of the State of Kansas, entitled an 'Act to authorize counties, incorporated cities and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water power, or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith.' Approved March 2, 1872.

"IN WITNESS WHEREOF, the said Barbour County, in the State aforesaid, has caused this bond to be signed by the Chairman of the Board of County Commissioners and attested by the County Clerk, this First day of September, A. D. 1873.

{ SEAL. }

S. H. ULMER,

Chairman Board County Commissioners.

Attest:

M. D. HOUK, County Clerk."

(Record, p. 3.)

Also a copy of one of said coupons, which is as follows:

"On or before the first day of September, 1875, Barbour County, in the State of Kansas, promises to pay to the bearer *Fifty Dollars*, at the National Park Bank in the City of New York, for value received, the same being the semi-annual interest due on Railroad Bond No. 1.

$50.00.

S. H. ULMER,

Chairman Board County Commissioners.

M. D. HOUK, County Clerk."

(Record, p. 4.)

Also a copy of the said registration by the Auditor of State, which is as follows:

"STATE OF KANSAS—ss: I, D. W. Wilder, Auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine, and the same has been duly registered in my office according to law.

"In witness whereof I have hereunto set my hand and affixed my seal of office, at the city of Topeka, this 19th day of November, 1873.

SEAL.

[Signed] D. W. WILDER, Auditor."

(Record, p. 4.)

Defendant in error answered:

That on August 27, 1873, an election was held and a proposition voted, to issue as a donation to the said N., K. & S. W. R. R. Co. $100,000 of bonds to aid in the construction thereof, to run thirty years and bear seven per cent. interest, payable semi-annually March and September 1st, in New York, said bonds to be issued and deposited in the office of the State

Treasurer of Kansas, to be delivered to the Railroad Company upon conditions:

1st.—When railroad completed from Hutchinson to Medicine Lodge there should be delivered $50,000 of bonds.

2nd.—When completed and cars running to Sun City, the other $50,000 of said bonds should be delivered, provided a depot should be built and maintained in Medicine Lodge and road cross the street south of Kansas Avenue in said town, build a depot within one-fourth of a mile of Lake City, and another between Lake City and Medicine Lodge; or if built in the other direction, then $50,000 of bonds should be delivered when built and cars running from some point on A., T. & S. F. R. R. to Sun City, provided that within ninety days thereafter the railroad should be built and cars runnimg from Sun City to Medicine Lodge, and when built and cars running to Medicine Lodge the other $50,000 of bonds to be delivered. The railroad should be of usual gauge, of first class material, construction and equippage. No interest was to become due on the bonds until six months after delivery. If railroad not built and cars running to Medicine Lodge in eighteen months after vote $50,000 of bonds should be forfeited, and if not to Sun City in twenty-one months from vote then the other $50,000 should be forfeited. That the County might by vote of the people change the bonds to any other railroad if first built. If the bonds were not issued to the Railroad Company they should be returned to the County by the State Treasurer, which proposition, with conditions, &c , was duly carried by a majority of the electors of said County voting. That no work has ever been done on said railroad under any contract therefor with the County, and no other vote ever ordered or had to authorize the issue of said bonds to any Railroad Com-

pany. That said S. H. Ulmer, pretending to act as Chairman of the Board of County Commissioners, did on November 10, 1873, without any authority from the County or said Board, and under pretense of aiding in the construction of said railroad, sign said bonds and coupons, and procured them to be signed by M. D. Houk, acting clerk of said Board of Commissioners, and caused them to be attested and sealed with the corporate seal of the County, when in fact no work has ever been done on said railroad and said bonds never deposited with the Treasurer of State, as provided by law and the conditions of said vote. That said N., K. & S. W. R. R. Co. was never duly organized, never had any existence in the State of Kansas. That on January 16, 1873, it filed its charter in the office of Secretary of State, which was done for the purpose of cheating and defrauding the County of said bonds, and that said Ulmer and other members of said Board of County Commissioners and Houk were parties to said conspiracy. That said Ulmer appropriated said bonds and coupons to his own use, and that of Houk and the use of others conspiring with them as aforesaid. That the County has received no consideration for said bonds and coupons, of all which facts the plaintiff had notice before he became the owner and holder thereof. That said bonds and coupons were never executed and delivered by the County or by any agent or officer authorized to do so; and the Auditor of State never had any right, power or authority to register the same, wherefore the bonds and coupons are void. (Record, p. 6.)

Plaintiff in error filed a general replication. (Record, p. 10.)

A written waiver of a jury was filed, and the cause

submitted to the Court on an agreed statement of the facts. (Record, p. 33.)

From said agreed facts and special findings by the Court it appears that plaintiff seeks to recover the coupons due September 1st, 1875, and those due March and September 1st, 1876, amounting to $15,000, from the one hundred bonds of Barbour County, dated September 1, 1873. (Copy of bond attached.) (Record, pp. 15 and 37.)

Certificate of the Auditor of State. (Record, p. 16.)

Copy of coupon. (Record, p. 16)

The plaintiff purchased said bonds and coupons before maturity, and without notice (unless the facts stated constitute notice) of one W. N. Coler, of New York City, under an agreement of which a copy is attached. (Record, pp. 16 and 37.)

This agreement recites:

[That the Municipal Trust has been established with reference to contemplated investments in American municipal bonds on the principles of the prospectus annexed (See Record, p. 21); that said Coler is in possession and control of a large number of American municipal bonds which he is authorized to sell and dispose of, including those in schedule annexed (See Record, p. 19), and provides that Coler shall sell and the Municipal Trust shall buy for £700,000 sterling such of the bonds mentioned, or such other American municipal bonds as may be agreed upon, as shall when taken together yield interest at the rate of £9.105 per cent. per annum gold on said purchase money, exclusive of the profits de-

rived from periodical payments of bonds at par, and so that not more than £35,000 shall be invested in the same security.

Coler guarantees that all said bonds have been issued in conformity with the laws of the United States, and are valid, subsisting debts of the municipalities named, and that the entire indebtedness of each in no case exceeds ten per cent. of the cash value of the property liable for the loan.

The whole £700,000, less £2 per cent., shall be paid to Coler as hereinafter stated, and Coler shall immediately before each installment of purchase money becomes payable, deliver to the committee of the trust (of which plaintiff is chairman) said bonds yielding interest as stated upon the amount of said installment, but nothing shall be paid before delivery of said bonds yielding said £9.10 per cent. on the amount of each of said installments to said committee. The committee by giving Coler written notice within six months after any of said bonds have been selected may reject the same.

In case the whole £700,000 is not subscribed for, Coler shall take certificates of the trust for the amount of the deficiency, and in case any of said certificates are defaulted for nonpayment of installments. Coler shall take the same at par. The trust may retain £1.10 per cent. of said £700,000 to meet the expenses of the trust.

"8. And the said William Nicholas Coler shall be and is hereby constituted the sole American agent for the trust, so long as he and the committee shall be able to agree on the terms of remuneration." (Record, p. 18.)

Coler shall at any time prior to March 27, 1874, sell to the trust, if the committee require it, in addition to those in the schedule, bonds yielding said rate, £9.10 per cent. in gold on the purchase money, for any amount not exceeding £300,000, he to allow said £2 per cent. thereon.]

Schedule of bonds. (Record, p. 19.)

This $100,000 bonds was part of a block of $450,000 of American municipal bonds purchased under said agreement; for the block Coler was to be paid $386,400. Of this, $250,000 was paid in cash, and $136,400 in the certificates of the trust at par. These bonds were purchased for the Municipal Trust, which is not a corporation or company, but a private association formed under a deed of trust (Record, p. 20), of which association plaintiff is the head or chairman, and by arrangement with his coleagues on the executive committee, all coupons needed to be put in suit are treated as in his sole hands as legal holder and owner. (Record, pp. 21 and 37.)

[This deed of trust (Record, p. 21) is dated December 15, 1873, is between C. W. W. Fitzwilliam *et al.*, called the trustee; Charles E. Lewis, chairman of committee of certificate holders, *et al.*, called the committee, and H. F. Gibb *et al.*, called the nominal covenantees; recites the invitation of subscription for the purpose of purchasing of securities thereinafter named; subscriptions may be paid in such securities as come within the scope of the trust; to each subscriber shall be issued certificates in form set forth in schedule thereto; each holder of an A certificate being entitled to a B certificate for one half the amount of the A certificate, and to the A certificates will be attached coupons for interest as thereinafter mentioned.

Therefore the trustees and committee covenant with the covenantees, &c., for and on behalf of the holders for the time being of said certificates in manner following:

SECTION 1. The sum of £350,000, after deducting a certain percentage, shall be held upon trust in manner and for the purposes thereinafter named.

SEC. 2. The business to be managed by a committee of not less than four nor more than twelve, the first committee to consist of said Lewis *et al.*

SEC. 8. (Record, p. 22.) The committee may invest the available capital of the trust in American public municipal bonds, but not more than one twentieth thereof shall be invested in the securities of one municipality at one time. They may sell and reinvest as they think fit.

SEC. 10. (Record, p. 23.) The annual produce of the securities and money arising from the sale and redemption of bonds shall be applied, first, to payment of expenses of the trust; second, to payment of 7 per cent. interest per annum on amount of A certificates to the holders for the time being; third, to formation of a reserve fund; fourth, to redemption at par of A and B certificates.

SEC. 11. (Record, p. 23.) If there is not enough money to pay the 7 per cent. interest the money shall be divided pro rata among the certificate holders.

SEC. 12. The certificates to be redeemed shall be determined by lot.

SEC. 17. (Record, p. 24.) The holder of any certificate that has been redeemed ceases to have any interest in the trust.

SEC. 18. When the capital of the trust is reduced to two-thirds of the amount that has been subscribed, the remaining securities shall be realized and proceeds divided among the then certificate holders, unless at a general meeting they otherwise elect.

SEC. 19. The committee shall attach to the A certificates coupons for the interest.

SEC. 28. (Record, p. 26.) There shall be at least one meeting of certificate holders annually for the transaction of business, and only such persons as produce certificates shall be entitled to vote.

SEC. 35. (Record, p. 27.) Every trustee and member of committee shall be indemnified out of the trust fund for all losses and expenses incurred by them.

SEC. 39. (Record, p. 28.) The trustees and members of committee shall be entitled to retain out of trust funds all expenses sustained or properly incurred by them and not thereinbefore provided for. The securities of the trust shall be turned over to the trustees and by them to the bankers of the trust, and can be withdrawn only on an order of the committee. The funds shall be kept in the banking house selected for the trust, and drawn out on the order of at least two members of the committee countersigned by the agent of the trust or by the secretary for the time being. The trustees and committee shall not be personally responsible except for their own individual willful acts or defaults. The trustees and committee are elected by the certificate holders.

SEC. 40. (Record, p. 28.) Any provisions of the deed of trust, except sections 25, 26 and 27, may be altered, varied or amended by a majority of certificate holders.

The certificates referred to are as follows:

'THE MUNICIPAL TRUST.

FORM OF A CERTIFICATE—FIRST ISSUE, 1873.

No. ——. £100.

This is to certify that the holder of this certificate is entitled to the sum of £100, part of the securities included in the capital of £350,000, less one and a half per cent., forming the Municipal Trust, and to all the benefits secured to the holders of A certificates by a certain trust deed regulating the management of said trust, bearing date the 15th day of December, 1873. Dated the 25th day of April, 1874.'

Signed by the agents of the trust and two members of the committee. (Record, p. 29.)

Form of coupon attached to A certificate is as follows:

'No. ——. £100.

Coupon for three months interest. £1 15s 0d. Due ————, 18—. Payable at Messrs. J. H. Rudall & Sons, 20 King William street, London.

[Signed] ————————.'

(Record, p. 29.)]

The certificates and coupons pass from hand to hand, and are payable to bearer, and are the same as the $136,400 given to Coler by the trust as part consideration for said block of bonds. (Record, p. 30 and 37.)

The bonds in suit were delivered by Coler to the trust April 30, 1874, $30,000; May 13, 1874, $50,000, and June 4, 1874, $20,000, and paid for on delivery. (Record, pp. 31 and 37.)

Coler is insolvent and has gone through bankruptcy. (Record, pp. 32 and 37.)

On August 27, 1873, the proposition to vote $100,000 as a donation to the N., K. & S. W. R. R., and issue $100,000 in bonds to run thirty years in payment, said bonds to be placed in escrow with State Treasurer, $50,000 to be delivered when the railroad completed to Medicine Lodge and $50,000 when completed through Barbour County, was submitted to the voters of Barbour County and duly carried. No part of the road was ever built and no work done on it. The bonds and coupons in suit were signed and sealed by the chairman and clerk of the Board of County Commissioners of Barbour County by order of the Board at a meeting held at Hutchinson, in Reno County, and left with one Hutchinson to be deposited with the State Treasurer, as required by submission to the vote of the people. The bonds were not deposited with the State Treasurer; were procured to be registered by Hutchinson by the Auditor of State and then fraudulently put in circulation.

The records of the Board show the bonds to have been issued in accordance with vote taken, to run twenty years and bear 10 per cent. interest. These records were made up before the signing of the bonds from slips of paper, but they are false.

The plaintiff purchased the bonds as agent of the trust and they were paid for by the trust.

The certificates above set out are the same as all others issued by the trust, and represent the capital of the trust which is $1,150,000.

Plaintiff testified that on October 30, 1875, he loaned the trust £1,500 and on November 9th £600 of his own monies on the security of a deposit of the coupons, among others from the bonds on which this suit is brought, and as over £1,400 is still due he claims to be the owner and holder of the coupons in suit in his own right. (Record, pp. 32 and 37.)

There was no assessment roll in the county in 1873 and 1874, and the assessment of 1875 was $68,000. In 1873 the county was first organized, contained but few inhabitants, and only 127 votes were cast at the election upon said proposition. When plaintiff purchased said bonds Coler furnished him a certificate signed by the Board of County Commissioners and Clerk, dated November 6, 1873, stating the population of the county to be about 3,800 and the amount of taxable property to exceed $1,000,000, but these statements were false. (Record, pp. 33 and 38.)

The Court below found the facts specially, and as they had been agreed upon and as above set out in full. (The second figure in references is to the findings by the Court.) (Record, p. 37.)

The Court below found as a conclusion of law, that the law of 1872, under which the bonds were issued, required the bonds to be placed in the hands of the State Treasurer in escrow; made him the agent of the County for the delivery of the bonds, and held that they could not be valid until they had so passed, and as it was admitted they had not so passed, the plaintiff was not entitled to recover. (Record, p. 33.)

Judgment was entered for defendant and against

plaintiff for costs, and the plaintiff duly entered his exceptions. (Record, p. 39.)

Appeal bond. (Record, p. 30.)

Writ of error. (Record, p. 40); (Citation, p. 40.)

These bonds are issued under Chapter 68, Laws 1872, p. 110, State of Kansas.

Section 1 is as follows:

"SECTION 1. That the board of county commissioners "of any county, the mayor and common council of any "incorporated city, and the trustee, clerk and treasurer of "any municipal township, in this state, are hereby em- "powered to issue the bonds of such county, city or town- "ship, in any sum necessary, not greater than ten per "cent., inclusive of all other bonded indebtedness, of the "taxable property of such county, city or township, for "the purpose of building bridges, free or otherwise, or to "aid in the construction of railroads or water power by "donation thereto, or the taking of stock therein, or for "other works of internal improvement: *Provided*, That "all counties may issue in addition to the amount "authorized by this section, bonds not to exceed one "hundred thousand dollars; and all counties having "property of an assessed valuation of three million dol- "lars or more, may issue in addition thereto, two hundred "thousand dollars."

Section 2 provides:

That the bonds shall be in sums of not less than $100 nor more than $1,000, payable in New York, to run not less than five nor more than thirty years, with interest not to exceed 10 per cent. payable semi-annually, and shall

be signed by the chairman of the Board of County Commissioners and attested by the County Clerk.

Section 3 is as follows:

"SECTION 3. Before any bonds shall be issued, as "herein provided, the same shall be ordered by a vote of "the qualified electors of such county, city or township."

Section 4 provides:

That the notice of the election shall be published and shall state the time and place of election, the railroad in the construction of which it is proposed to aid, whether it is a donation or for stock or other work of internal improvement, and for which bonds are to be voted.

Section 9 provides:

That if a majority of the votes cast at any such election be in favor of the proposition and the issuing of bonds, "then the proper officers of such county * * * "shall at once subscribe upon the books of such railroad, "specifically setting forth the conditions upon which such "subscription is made, the amount of such donation "thereto, stock taken therein or bonds voted therefor."

Section 10 is as follows:

"SECTION 10. The said officers of any county, city or "township are hereby authorized and empowered to enter "into any and all contracts necessary to carry into effect "the provisions of this act."

Section 11 is as follows:

"SECTION 11. That if the proposition for which bonds "were voted be to aid in the construction of a railroad, or

be signed by the chairman of the Board of County Commissioners and attested by the County Clerk.

Section 3 is as follows:

"SECTION 3. Before any bonds shall be issued, as "herein provided, the same shall be ordered by a vote of "the qualified electors of such county, city or township."

Section 4 provides:

That the notice of the election shall be published and shall state the time and place of election, the railroad in the construction of which it is proposed to aid, whether it is a donation or for stock or other work of internal improvement, and for which bonds are to be voted.

Section 9 provides:

That if a majority of the votes cast at any such election be in favor of the proposition and the issuing of bonds, "then the proper officers of such county * * * "shall at once subscribe upon the books of such railroad, "specifically setting forth the conditions upon which such "subscription is made, the amount of such donation "thereto, stock taken therein or bonds voted therefor."

Section 10 is as follows:

"SECTION 10. The said officers of any county, city or "township are hereby authorized and empowered to enter "into any and all contracts necessary to carry into effect "the provisions of this act."

Section 11 is as follows:

"SECTION 11. That if the proposition for which bonds "were voted be to aid in the construction of a railroad, or

" any bridge or other work of internal improvement,
" either by donation thereto or the taking of stock therein,
" then upon the subscription being made therefor, as
" hereinbefore provided, the officers of such county, city or
" township [shall thereupon issue the bonds of such
" county, city or township] for the amount of such sub-
" scription, and shall forthwith deliver the same, together
" with the original, or a copy of the subscription, setting
" forth its terms in full to the treasurer of state, which
" said bonds shall be held by said treasurer of state in
" escrow until the conditions in the terms of the said sub-
" scription to such railroad or other work of internal im-
" provement shall be in all things fully complied with:
" that upon the conditions of the said subscription being
" in all things fully complied with, then the treasurer of
" state shall deliver such bonds to the parties entitled
" thereto, who shall have the same registered as herein-
" after provided: *Provided*, That such bonds shall not
" bear interest or be negotiable until after the delivery and
" registration thereof: *And provided further*, That in case
" of a failure to comply with the conditions in the terms of
" such subscription, then such bonds shall be by the said
" treasurer of state cancelled, and re-delivered to the
" county, city or township issuing the bonds: *And pro-*
" *vided further*, That this section shall not apply where
" the people may have named some party as trustee in
" their vote on the proposition, and the contractor may
" thereafter agree to the same."

Section 12 is as follows:

" SECTION 12. The officers of any county, city or
" township issuing such bonds shall make registration
" thereof in a book to be kept for that purpose, showing

" the date, amount, number, maturity, and rate of interest
" of such bonds, and if issued for the building of a bridge,
" what bridge; or, if to aid in the construction of a rail-
" road or other work of internal improvement, of what
" railroad or other work of internal improvement, and
" whether the same be a donation or for stock therein,
" and shall at the time of the issuing of the same, make
" out and transmit to the auditor of state a certified
" statement of the number, amount and character of the
" bonds so issued, to whom issued and for what pur-
" pose, which statement shall be attested by the clerk of
" the county, city or township issuing the same, together
" with the corporate seal of such county, city or town-
" ship, if any such there be."

Section 14 is as follows:

" SECTION 14. Within thirty days after the delivery
" of such bonds the holder thereof shall present the same
" to the auditor of state for registration, and the auditor
" shall, upon being satisfied that such bonds have been
" issued according to the provisions of this act, and that
" the signatures thereto of the officers signing the same
" are genuine, register the same in his office, in a book to
" be kept for that purpose, in the same manner that such
" bonds are registered by the officers issuing the same,
" and shall, under his seal of office, certify upon such
" bonds the fact that they have been regularly and legally
" issued; that the signatures thereto are genuine, and
" that such bonds have been registered in his office ac-
" cording to law, for which registration and certificate, the
" auditor shall be entitled to a fee of one dollar for each
" bond so registered, to be paid by the holder thereof."

Sections 1 and 6, Chapter 14 General Statutes Kansas, 1868, are as follows:

"SECTION 1. All bonds, promissory notes, bills of "exchange, foreign and inland, drawn for any sum or "sums of money certain, and made payable to any per- "son or order, or to any person or bearer, shall be "negotiable by indorsement thereon, if payable to order, "and by delivery if payable to bearer, so as to absolutely "transfer and vest the property thereof in each and every "indorsee or holder, successively; but nothing in this "section shall be construed to make negotiable any such "bond, note or bill of exchange drawn payable to any "person or persons alone, and not drawn payable to any "bearer or assigns."

"SECTION 6. Any indorsee or holder to whom any "such bond, note or bill of exchange made negotiable "by this act is made payable by such indorsement or "delivery, may institute and maintain an action on such "bond, note or bill for the recovery of the money due "thereon against the maker, drawer or obligor, or against "the indorser, having first used due diligence to obtain "payment of the drawer, maker or obligor."

ASSIGNMENTS OF ERROR.

The plaintiff assigns as error:

1st. The Court erred in finding that the bonds in suit must pass through the hands of the State Treasurer in escrow, before they could become negotiable or bear interest and become binding obligations of the County of Barbour; and in finding that the acts of the officials and

" the date, amount, number, maturity, and rate of interest
" of such bonds, and if issued for the building of a bridge,
" what bridge; or, if to aid in the construction of a rail-
" road or other work of internal improvement, of what
" railroad or other work of internal improvement, and
" whether the same be a donation or for stock therein,
" and shall at the time of the issuing of the same, make
" out and transmit to the auditor of state a certified
" statement of the number, amount and character of the
" bonds so issued, to whom issued and for what pur-
" pose, which statement shall be attested by the clerk of
" the county, city or township issuing the same, together
" with the corporate seal of such county, city or town-
" ship, if any such there be."

Section 14 is as follows:

" SECTION 14. Within thirty days after the delivery
" of such bonds the holder thereof shall present the same
" to the auditor of state for registration, and the auditor
" shall, upon being satisfied that such bonds have been
" issued according to the provisions of this act, and that
" the signatures thereto of the officers signing the same
" are genuine, register the same in his office, in a book to
" be kept for that purpose, in the same manner that such
" bonds are registered by the officers issuing the same,
" and shall, under his seal of office, certify upon such
" bonds the fact that they have been regularly and legally
" issued; that the signatures thereto are genuine, and
" that such bonds have been registered in his office ac-
" cording to law, for which registration and certificate, the
" auditor shall be entitled to a fee of one dollar for each
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"SECTION 6. Any indorsee or holder to whom any "such bond, note or bill of exchange made negotiable "by this act is made payable by such indorsement or "delivery, may institute and maintain an action on such "bond, note or bill for the recovery of the money due "thereon against the maker, drawer or obligor, or against "the indorser, having first used due diligence to obtain "payment of the drawer, maker or obligor."

ASSIGNMENTS OF ERROR.

The plaintiff assigns as error:

1st. The Court erred in finding that the bonds in suit must pass through the hands of the State Treasurer in escrow, before they could become negotiable or bear interest and become binding obligations of the County of Barbour; and in finding that the acts of the officials and

agents of said County, and the certificate of registration by the Auditor of State endorsed on said bonds, and the recitals in said bonds, did not create and constitute a perfect and complete bar and estoppel to and against any defense that was set up to said bonds by defendant in the hands of the plaintiff; and in not finding the contrary thereof.

2nd. The Court erred in not finding from the agreed facts and facts as found by the Court, that the plaintiff was entitled to recover of the defendant as claimed in his petition and in not ordering judgment to be rendered accordingly as prayed.

3rd. The Court erred in finding from the agreed facts and facts as found by the Court, that the plaintiff was not entitled to recover of the defendant in said action as prayed by the plaintiff and in finding for the defendant and ordering judgment in favor of the defendant and against the plaintiff for costs, and in ordering execution to issue therefor.

ARGUMENT.

There is no question of authority in this case; the power to issue the bonds in controversy is ample. The only question in the view of the Court below is the one of the proper exercise of that power.

Section 1 of the Act of 1872 gives authority to issue $100,000 of bonds in excess of 10 per cent. on the assessed valuation of the county as a donation to railroads, &c.

Section 2 provides that such bonds may be in sums of $1,000, payable in New York, run thirty years and bear

10 per cent. interest, and shall be signed by the Chairman of the Board of County Commissioners and attested by the County Clerk.

Section 3 provides that such bonds shall first be ordered by a vote of the electors of the county.

Section 4 provides for the notice of election.

Section 9 provides that if the vote is in favor of the proposition the proper officers of the county shall at once subscribe upon the books of the railroad the amount of the donation thereto.

Section 10 gives the officers of the County authority to enter into all contracts necessary to carry into effect the provisions of said act.

Section 11 provides that when the subscription is made, &c., the officers of the county shall issue the bonds and shall deliver them, with the original or copy of the subscription setting forth its terms, to the Treasurer of State in escrow until the conditions have been complied with, when he shall deliver them to the party entitled to them, who shall then have them registered, provided that the bonds shall not bear interest or be negotiable until after such delivery and registration.

Section 12 provides that the officers of the county issuing such bonds shall register the same in a book for that purpose, showing date, amount, number, maturity, rate of interest, to what railroad, whether as a donation or for stock, and transmit a certificate of the same to the Auditor of State.

Section 14 provides that within thirty days after delivery of the same the holder shall present them to the Auditor of State for registration, and *he being satisfied that the bonds are issued in accordance with the provisions of the Act* and the signatures thereto are genuine shall register the same in his office, in a book kept for that purpose, in the same manner as they are registered by the officers of the county, and shall under the seal of his office certify the same upon such bonds.

I.

It is admitted that all things were not regular in the issue of said bonds. The proposition submitted to vote was to donate $100,000 of bonds running thirty years, and no part of the road was ever built (Record, pp. 32 and 37; *Supra*, p. 13), whereas the bonds run twenty years and were executed out of the county. (Record, p. 15.) But the bonds recite that they are issued under and in pursuance of this Act (citing it). (Record, p. 15.) They are properly signed and sealed, and that works a complete estoppel against the county showing any irregularity in the issue of the bonds, such as failure to build road, &c.

Douglas County *vs.* Bolles, 4 Otto, 104.
Brooklyn *vs.* Insurance Company, 9 Otto, 362.
Block *vs.* Commissioners, 9 Otto, 686.
Coloma *vs.* Eaves, 2 Otto, 484.

The county officials kept the records of said county, and they show that the bonds are issued in accordance with the proposition submitted to the voters (Record, pp. 32 and 37; *Supra*, p. 13), and the estoppel created thereby

is as conclusive as though it appeared in the bonds themselves.

Rock Creek *vs.* Strong, 6 Otto, 271.
Randolph County *vs.* Post, 3 Otto, 502.

It is true these records were false (Record, pp. 32 and 37: *Supra*, p. 13), as are also the recitals in the bonds, but they were made by the proper officials of said county, whose duty it was to make and keep them and to determine the facts, and contained facts of which these officials were the exclusive judges (Section 10; *Supra*, p. 16), and are equally binding upon the county whether true or false. The plaintiff had the right to conclusively presume them true.

Marcey *vs.* Oswego Township, 2 Otto. 637.
East Lincoln *vs.* Davenport, 4 Otto, 801.
Calhoun County *vs.* Galbraith, 9 Otto, 214.

There was no assessment in the county for 1873 (Record, pp. 33 and 38; *Supra*, p. 14), but the bonds would still be authorized under Section 1 of the Act (*Supra*, p. 15) which authorizes $100,000 in addition to 10 per cent. of the assessment, were not the recitals themselves—that the bonds are issued under and in pursuance of the law—conclusive as to the amount authorized.

Marcey *vs.* Oswego, 2 Otto, 637.
Buchan *vs.* Litchfield, 12 Otto, 278--292.
Wilson *vs.* Salamanca, 9 Otto, 499.

The proper county officials furnished certificates that the requisite population and taxable property existed to authorize the issue of the bonds, and these were furnished to the plaintiff when he purchased the bonds, and the defendant can not now be heard to deny it even though it was false. (Record, pp. 32 and 38; *Supra*, p. 14.) These

certificates gave the bonds standing and character in the market, and to allow them to be contradicted now would be to authorize the perpetration of a direct fraud which will not be tolerated.

Cases *Supra*, and 4 Otto, 801, and 9 Otto, 214.

II.

It was the opinion of the Court below that as Section 11 (*Supra*, p. 17) provided that the bonds should be issued and delivered to the State Treasurer in escrow, and by him delivered to the parties entitled thereto upon the performance of the conditions upon which voted, and should not be negotiable or bear interest until they had been delivered and registered, a limitation was thereby imposed upon their negotiability and the bonds could not be valid—and hence no innocent purchaser—unless they had actually passed through his hands, he being made thereby the agent of the county for that purpose. The Court was clearly in error upon this point. There has not been a bond issued for the past twenty years that there was not in the constitution, or the act under which issued, or the order of the corporate authorities, some precedent condition to be performed prior to the issue and delivery of a valid, negotiable obligation. There are some cases in which these conditions have been complied with. The others are only upheld upon the ground that the municipality has done some act or made some recital in the bond or otherwise which precluded it from denying that its officers had performed their duty. But there is no case anywhere which holds that there is a condition as to which there can be no estoppel. Wherever there is a

condition nonperformance can be cured by proper recitals, and those recitals need not of necessity be made by the party who was to perform the condition.

Herein consists the error of the Court. The State Treasurer is not the final arbiter by whose act these bonds were to be made valid negotiable instruments. The bonds were to be delivered to him, and by him to the party entitled thereto. That is the extent of his authority and his power, and the limit of his duty; he is to keep no record and do no official act. There is not to be and is nothing in his office or upon the bonds or elsewhere to be done by him which will show performance or nonperformance of his duty, or that of others, and it can only be determined by a personal interview with him. Did the framers of this law intend that the validity of these bonds should be left to be determined in this uncertain and precarious manner? Clearly they did not. It is true Section 11 says they shall not be negotiable nor bear interest until delivery, and this delivery is the extent of the Treasurer's duty, But this is not all. The bonds are no more negotiable when he delivers than when he took them. The law adds, "*and the registration thereof.*" With this the Treasurer has nothing to do. That is to be done by the State Auditor, and his is the final act that stamps the seal of negotiability and validity upon the bonds. He is made the final arbiter to determine whether all previous officials and agents have done their duty, and upon his act purchasers have a right to rely, and by it the county must be bound.

Section 12 (*Supra*, p. 17) of the act provides, that the county officials shall make registration of the bonds, showing date, amount, number, maturity, rate of interest, in

aid of what railroad, whether as a donation or for stock, and shall transmit a certificate of the same showing the character of the bonds to the Auditor of State.

Section 14 (*Supra*, p. 18) provides that *within thirty days after delivery of such bonds the holder thereof shall present the same to the Auditor of State for registration, and he being satisfied that the bonds have been issued according to the provisions of this act, that the signatures thereto are genuine, register the same in his office in a book kept for that purpose, in the same manner that they are registered by the officers issuing the same, and shall under the seal of his office certify upon such bonds the fact that they have been regularly and legally issued, that the signatures thereto are genuine, and that they have been registered in his office according to law.*

If the Treasurer is made the agent of the county it is solely for the delivery of the bonds; it is simply for the greater protection of the county by getting the bonds into hands of an honest and disinterested party. He is to determine absolutely nothing. By the same Statute and a later Section of it the *State Auditor* is also made the *agent* of the county. He has a duty to perform, and is by the act placed in possession of information to enable him to do it intelligently and properly. He is furnished with a duplicate of the registration of the bonds by the county, to enable him to determine whether the bonds presented for registration are the ones issued. He is required to keep a record of the bonds in a book for that purpose. They can not be registered until the conditions upon which they were issued have been complied with. They can not be registered until they have been delivered, because they must be presented for registration by the holder, and he

can not get possession from the State Treasurer until the conditions upon which issued have been complied with. When presented to him he compares them with the copy of county registration furnished him, and otherwise satisfies himself that the signatures thereto are genuine; that they have been regularly and legally issued; *that the provisions of said act have been complied with* (and one of those provisions is the delivery to the State Treasurer in escrow, and by him to the party entitled thereto when the conditions are complied with), and he shall certify these facts under his official signature upon the bonds. And until he has done this these bonds, under Section 11 of the act, do not bear interest and are not negotiable. Then their negotiability is made to depend not upon delivery by the Treasurer but upon their registration by the Auditor. Unless they have been placed in the hands of the Treasurer in escrow and he has delivered them upon compliance with the condition of the vote, the Auditor has no authority to register them because he must *first be satisfied that the provisions of said act have been complied with.* But if he does register them and endorse upon them the certificate required by the act, that is the final execution of the bonds and they immediately bear interest and become negotiable. Every purchaser then has a right to rely upon his certificate and need not look further; whether it be true or false is immaterial. The Auditor is made the official of the county to determine those facts, and when he does so it is a judicial determination thereof by the official appointed by the law for that purpose, and his conclusion is final and binding upon the county.

Coloma *vs.* Eaves, 2 Otto, 484.

The act will bear no other interpretation. If it does not mean that it means nothing, and all the decisions of

this Court upon the question of estoppel must be taken for naught.

In Anthony *vs.* the County of Jasper (11 Otto, 697) this Court passing upon the registration law of Missouri, therein set out, which is almost identical with that under consideration, says:

"It (referring to the registration act) in effect provides "that no bond issued by counties, cities or incorporated "towns shall be valid, that is to say, completely executed, "until it has been countersigned or certified in a particular "way by the State Auditor. For this purpose, after "being executed by the corporate authorities, it must be "presented to that officer and he must inquire and de- "termine whether all the requirements of the law author- "izing its issue have been observed, and whether all the "conditions of the contract in consideration of which it "was to be put out have been complied with. To enable "him to do this, evidence must be submitted, which he is "required to file and preserve. If he is satisfied, the "registry is made and the requisite certificate endorsed on "the bonds. This being done the execution of the bonds "is complete, and under the law it may then be negotiated, "that is to say, put on the market as valid commercial "paper. When the certificate is found on the bond the "purchaser need not inquire whether what has been "certified to is true, as against a *bona fide* holder the "public is bound by what its authorized agents have done "and stated in the prescribed form."

Anthony *vs.* Jasper County, 11 Otto, 697.
Marcey *vs.* Oswego Township, 2 Otto, 637.
Rock Creek *vs.* Strong, 6 Otto, 271.

III.

If the State Auditor were not made an officer of the county, whose recital of a fact would bind the county, these bonds would still be valid because they were caused to be registered and fraudulently put in circulation by one Hutchinson, into whose hands the bonds were placed by order of the Board of County Commissioners as the agent of Barbour County. (Record, pp. 32 and 38; *Supra*, p. 13.) It is too well settled to require argument that where loss must be suffered by the misconduct of an agent it must be suffered by the one who has placed it in the power of such agent to do the wrong.

Hern *vs.* Nichols, 1 Salk, 289.
Merchants' Bank *vs.* State Bank, 10 Wal., 604.
County of Macon *vs.* Shores, 7 Otto, 272.
Pompton *vs.* Cooper Union, 11 Otto, 196.

The authority clearly exists for the issue of these bonds. They contain all recitals necessary to show that everything necessary to be done to make them valid was done, and the county can not now be heard to deny it.

Knox *vs.* Aspinwall, 21 How., 544.
Mercer Co. *vs.* Hacket, 1 Wal., 83.
St. Joseph Tp. *vs.* Rogers, 16 Wal., 644.
Coloma *vs.* Eaves, 2 Otto, 484-90.

The bonds recite upon their face the circumstances which bring them within the power, and that is conclusive upon the county.

Orleans *vs.* Platt, 9 Otto, 676.
Pompton *vs.* Cooper Union, 11 Otto, 196.

The irregularities complained of were committed by the officers and agents of the county, and it is estopped from taking advantage of their defaults.

Supervisors *vs.* Galbraith, 9 Otto, 214.
East Lincoln *vs.* Davenport, 4 Otto, 801.

The bonds recite that they are issued *under and in pursuance* of the *law*, and the certificate of the Auditor endorsed thereon recites that the *signatures thereto are genuine and that the bonds are regularly and legally issued*. The power existing, these recitals conclusively imply that all precedent conditions to their valid issue have been complied with.

Coloma *vs.* Eaves, 2 Otto, 484.
Moultrie Co. *vs.* Savings Bank, 2 Otto, 631.
Buchannan *vs.* Litchfield, 12 Otto, 278 and cases cited.

IV.

The defendant insisted on the trial that the plaintiff was not a *bona fide* purchaser because a part of the consideration paid Coler for the bonds was in the certificates of the trust; that Coler thereby became a member of the partnership or corporation, was selling to himself, and whatever notice he had is chargable to the trust, that is we must prove Coler to be a *bona fide* purchaser, and the certificates of the trust being non-negotiable the plaintiff must follow them in his hands. But this position is unsound. Defendant's counsel have been led into the error by a misunderstanding of the nature of the trust.

These bonds were part of a block of $453,500 municipal bonds, and for them the trust paid Coler $250,000 cash and

$136,400 in the certificates of the trust, issued at par, (Record, pp. 20 and 37; *Supra*, p. 9) being about 85 cents on the dollar paid for the bonds. If the cash paid for the bonds had been *all* the consideration it would have been sufficient. A much less sum would have been a good consideration.

Galveston *vs.* Cowdry, 11 Wal., 459--464.

All the consideration agreed to be paid passed, and that was sufficient to pass the title, whether it was cash or not.

Dresser *vs.* The M. & I. Con. Co., 3 Otto, 92.

But they say by taking these $136.400 of certificates Coler became a member of the trust, and was selling to himself; we have not shown that he was a *bona fide* purchaser, therefore all are chargeable with notice, &c.

This leads us to inquire what is the Municipal Trust? It is not a corporation nor is it a copartnership. It is simply a collection of individuals who combine their capital for the purpose of investment. They have no articles of Association or other necessary prerequisites to the organization of a corporation. They entered into no contract among themselves nor with any one for them or on behalf of each other, and were not a partnership. It It was simply a subscription to a common fund for the purpose of investment in American municipal bonds. The bonds were to be purchased by the committee and the title to vest in the trustees. The bonds to be deposited by the trustees with the bankers of the trust. The whole business of the trust to be in the hands of this committee under the deed of trust, to which the subscribers and certificate holders are not parties. The capital was limited

to £350,000, and subscribers to this fund were to receive certificates signed by the committee, in sums of £100, for the amount subscribed, and to these certificates were attached coupons for the interest, payable quarterly, February, May, August and November 1st, each, annually, which it was expected to realize on the investments. The profits arising from the investments to be applied to the payment of expenses, interest (quarter-yearly as above) represented by these coupons, and to the redemption of certificates; or it might be reinvested as was the original fund. These certificates are payable to bearer and certify that the holder is entitled to £100; part of the securities of the trust included in the capital of £350,000 forming the Municipal Trust, and to all the benefits secured to holders of A certificates by the deed of trust. These certificates pass from hand to hand and the holders of them *for the time being* have annual meetings for the selection of members of the committee and trustees and other purposes, and none but persons then holding certificates can vote. The coupons attached to the certificates are likewise negotiable, payable to the holder, and pass from hand to hand. The committee may sell the securities and buy others, or otherwise dispose of the bonds purchased at pleasure. The investments as they are from time to time stand as a security for these certificates, but the certificate holders have no direct interest in, title to or control over them, nor have they any specific lien upon any security or set of securities, if indeed they have any lien at all, and no certificate holder can take any action in relation to them. The title to the property is in the trustees. The active management of the business is in the hands of the committee. (Record, p. 21 et seq.; *Supra*, p. 8 et seq.)

The character of such trusts as the Municipal Trust has been before the Court of Appeals in England in the case of Smith *vs.* Anderson. (Weekly Reporter, Vol. 29, No. 2, Nov. 13, 1880, p. 21.) [For the convenience of the Court the case is printed and attached hereto.] See also Johnson *vs.* Lewis (Federal Reporter, Vol. 6, No. 1, p. 27), opinion by Caldwell, Judge.

From the statement of the case it is manifest the trust under consideration was identical with the one now before this Court, and the Court says it is neither a corporation nor a copartnership within the ordinary understanding of business men nor in the meaning of the law—all the essential elements for either being wanting. This being an English institution and a construction thereof by the Court of Appeals of that country, we presume it is unnecessary to present authorities, that this Court will as a matter of judicial comity accept that construction. If this were not true this Court would be deciding that the trust had rights here which the Courts of its own country—the only place where its creditors have redress—decide it has not, and which it can not there enforce or have enforced against it.

This being then neither a corporation nor a co-partnership, but simply a subscription to a fund for investment, where the title to the property purchased is in the *trustees* and the management of the business in the hands of the *committee*, the subscriptions represented by certificates which pass from hand to hand, Coler by taking these certificates in part pay for the bonds did not become so identified with the trust that notice to him could be chargeable to the committee or the trustees or affect otherwise the *bona fides* of the securities purchased of him.

Coler becoming neither a stockholder or director or other officer in a corporation, nor the member of a co-partnership, we are unable to see how he could become connected with the trust so as to charge it and affect its securities with notice to himself only except by becoming a member of the committee or a trustee. The certificates are negotiable and pass from hand to hand by delivery and could not be followed in Coler's hands.

Smith *vs.* Anderson, *Supra.*

Coler is insolvent and has gone through bankruptcy (Record, pp. 32 and 37; *Supra*, p. 13), and whatever property he had has under the bankrupt law of the United States passed out of his hands and is protected in the hands of the present holders.

There is no evidence as to the character of Coler's ownership of the bonds; so far as this case is concerned it is immaterial whether he was a *bona fide* holder or not. The plaintiff is admitted to be, and that is sufficient to enable him to recover.

Goodman *vs.* Simonds, 20 Howard, 343.
Grande Chute *vs.* Wineger, 15 Wal., 355.
Marion Co. *vs.* Clark, 4 Otto, 278.

But it is admitted that these bonds were fraudulently put into circulation through the negligent act of an agent of the county and that of its officers. (Record, pp. 32 and 37; *Supra*, p. 13.) That being true it is an elementary proposition that the plaintiff must be shown to be not a *bona fide* holder; and if Coler is, as the defendant contends, one of the holders or owners, they must show him not a *bona fide* holder, and it is not incumbent on us to show that he was.

Collins *vs.* Gilbert, 4 Otto, 753.
Murray *vs.* Lardner, 2 Wallace, 110.

It is also contended that the plaintiff as pledgee could take no better title to said property than the pledgor had, and as Coler was a member of the trust and it was chargeable with notice through him, plaintiff can not recover in his individual capacity as pledgee of the coupons as security for a debt; but that is not the law. The pledgee takes the security if in good faith, absolutely free from any infirmity, the same as though he were an original purchaser. (Parsons on Notes and Bills, 2nd Ed., Vol. 2, pp. 42 and 43 and note; 13 East, 135 and note.)

Bowman *vs.* Wood, 15 Mass., 503.
Sheldon, Hoyt & Co. *vs.* Middleton, 10 Iowa, 18.

V.

It is also contended that Coler was the agent of the Municipal Trust by the agreement under which these bonds were bought, is presumed to be in collusion with the antecedent holders and notice to him was notice to the present holders of the bonds.

There are several answers to this position. First, Coler was the owner or holder of these bonds at the time the agreement referred to was made with him (Record, pp. 16 and 37; *Supra*, p. 13), and the bonds were purchased of him and not through him as an agent or otherwise, and the consideration was paid to him for them. (Record, pp. 20 and 31 and 37; *Supra*, p. 12.) Second, the bonds were put in circulation by the wrongful and negligent act of the defendant, its agent and officers, and the presumption is that Coler was a *bona fide* holder. There is nothing to show the contrary. (Record, pp. 32 and 38; *Supra*, p. 13.) Third, the bonds were purchased by a committee of the

trust (Record, p. 16), the title vested in the trustees for the benefit of the certificate holders for the time being. (See Trust Deed, Record, p. 21.) They being the real owners, and the committee and trustees not being their agents or directors and having no privity of contract or interest with them, notice to the committee or any agent of theirs would not affect their interest in or the title of the trustees to these bonds. Fourth, Coler was not the agent of the trust for the purchase of these or any other bonds. Article 8 of the agreement with Coler for the purchase of these bonds constitutes him "the sole American agent of the trust so long as he and the committee shall agree on terms of remuneration," (Record, p. 18, Sec. 8; *Supra*, p. 8) but that was not possibly an agency for the purchase of these bonds, for they were purchased of him by that very agreement, and he could not have been created agent until the agreement for the purchase was consummated. (See also agreed facts, Record, p. 16 Special findings, Record, p. 37; *Supra*, p, 7.)

VI.

It was argued on the trial of this cause in the Court below that the plaintiff had no capacity to sue and this action could not be maintained. It is agreed that the bonds were purchased for the account of the Municipal Trust, a private association of which the plaintiff is the head as chairman, and by agreement with his colleagues of the committee all coupons needed to be put in suit are treated as put in his sole hands as legal holder and owner. (Record, pp. 20, at bottom, and 37; *Supra*, p. 8.) He has possession in fact. It would be a very strange and ex-

tremely technical rule of law which would hold that under such circumstances he had no capacity to sue. Under Section 2 of the agreement or trust deed the business of the trust is managed by a committee. (Record, p. 22; *Supra*, p. 10.) The plaintiff is chairman of that committee. Preamble, (Record, p. 21; *Supra*, p. 9.) The committee may delegate its powers. Section 6, (Record, p. 22.) They have done so, and he is in the proper exercise of his powers in bringing this suit. He stands in the position of a trustee, and as such clearly has the right to sue.

Commissioners *vs.* Thayer, 4 Otto, 631.

The coupons are payable to bearer, pass from hand to hand by delivery merely, and may be sued by the holder. (Ch. 14, Sec. 1 and 6, p. 114 and 115 Gen. Stat. Kansas, 1868; *Supra*, p. 12.)

Williams *vs.* Norton, 3 Kansas, 295.
Washington *vs.* Hobart, 17 Kansas, 275–77.
Roberts *vs.* Bolles, 11 Otto, 119.
Collins *vs.* Gilbert, *Supra*.

It is well settled that possession of negotiable paper, payable to bearer, by a mere agent authorizes him to sue it in his own name. (Irwin *vs.* Bailey, Chicago Legal News, Vol. 11, No. 47, Aug. 9, 1879, p. 376, opinion by Drummond, Judge; Parsons on Notes and Bills, Vol. 2, 2nd Ed., p. 442, and cases cited in note n; also p. 443 and cases cited in note q.)

The plaintiff's deposition was taken in this case. Defendants were unwilling to admit that the plaintiff had loaned money to the trust and taken the coupons in suit

as collateral, so his testimony on that point was incorporated into the agreed facts as a part of his testimony for the consideration of the Court, and is that in October, 1875, he loaned the trust £1,500, and in November, 1875, £600, of which over £1,400 is still due and unpaid, upon the security of a deposit of the coupons in suit among others, and he is the sole holder and owner of the coupons in his own right. (Record, p. 32 at bottom; *Supra*, p. 14.) The Court so found the facts. (Record, p. 38.)

This being a fact, and so found by the Court, there can be no question of plaintiff's right to maintain the action in his own name, and does not require any argument or citation of authorities to sustain it. (See deed of trust, Sec. 35, Record, p. 27, and Sec. 39, Record, p. 28, *Supra* p. 10, for plaintiff's right to hold the coupons.)

It is apparent that the Court has found every fact in this case necessary to entitle plaintiff to recover, and every one necessary to constitute him a *bona fide* purchaser. If this statute was notice to the plaintiff and there could be no estoppel created as to the delivery of the bonds in escrow to the State Treasurer but by the act of the Treasurer himself, then of course the defect appears on the face of the bonds themselves, and no finding is necessary.

Goodman *vs.* Simonds, 20 Howard, 343.

And unless that be true, which it certainly is not, the plaintiff is found to be a *bona fide* purchaser for value before maturity and without notice. There is nothing in the agreement with Coler and nothing in the deed of trust which would make notice to Coler notice to the plaintiff in his individual capacity or as a representative of the trust,

and even if there was the admission and special findings make a case which would require notice to Coler to be proved, which was not done, and we insist that upon the agreed facts and special findings by the Court the plaintiff is entitled to recover, and this Court should reverse the judgment of the Court below and order a judgment to be entered for plaintiff as prayed.

JAMES GRANT & WHIT. M. GRANT,

for Plaintiff in Error.

COURT OF APPEAL.

From Chan. Div. *July 13, 16.*

SMITH *vs.* ANDERSON.

Share trust—Association of more than twenty persons—Business for the acquisition of gain—Companies Act, 1862, s. 4.

A body of more than twenty persons subscribed money to purchase a given class of securities. The shares bought were placed in the names of trustees. A trust deed to which the subscribers were not parties was executed between the trustees and a nominal covenantee. By this deed salaries and extensive powers of management (similar to those of directors of companies) were given to the trustees. Certificates of the nominal value of £100 passing to bearer by delivery were given to each subscriber in number proportional to the amount subscribed. Each certificate holder was to receive interest at six per cent., being a share of the annual produce of the securities. The certificates were subject to redemption out of the surplus produce by drawings, and, if there should be a sufficient surplus by other methods, at a fixed price of £120.

Held, that such a body was not "an association for the purposes of carrying on business having for its object the acquisition of gain" within the meaning of the 4th section of the Companies Act, 1862, and therefore though, there were more than twenty subscribers, the body need not be registered, and was not an illegal association if unregistered.

Sykes *v.* Beadon, *27 W. R. 464, L. R. 11 Ch. D. 170, overruled.*

Appeal from Jessel, M. R., who had decided that the Submarine Cables Trust was an illegal association under section 4 of the Companies Act, 1862. The trust was constituted under a deed, dated the 6th of September, 1871, made between Anderson and others, the trustees of the one part, and Sir Philip Rose for the certificate holders of the other part. The deed recited that certain shares in certain submarine telegraph companies (which shares were mentioned in a schedule) had been purchased on behalf of the sub-

scribers, who had received certificates for £100 for every £90 subscribed, and declared that the trustees should hold the scheduled securities in trust for the certificate holders for the time being on the provisions contained in the deed. The chief of these were shortly as follows:—

2. The annual produce of the securities to be applied (1) to pay expenses; (2) to pay interest at six per cent. per annum to the certificate holders for the time being; (3) in the redemption of so many of the certificates as the surplus income should permit.

5. The surplus to be applied in redeeming the certificates—(1) by purchase in the open market; (2) by tender from the certificate holders for the redemption of the certificates held by them; but in either case the price paid was not to exceed £120.

7. "If, at the expiration of any year after the redemption of as many certificates as possible by either or both of the said methods, the trustees shall have surplus funds applicable to the redemption of certificates, they shall redeem in the manner hereinafter mentioned as many certificates as such surplus funds be competent to redeem at the price of £120 for each certificate."

8. "The certificates to be redeemed as in the last-mentioned clause shall be selected by lot in the presence of a notary public."

11. "No certificate shall carry interest after it has been drawn, whether the amount be demanded and received by its holder or not."

13. "So soon as all the certificates shall have been redeemed, the securities then remaining subject to the trusts of this deed shall be realized under the directions of the trustees, and the net proceeds thereof shall be divided between the holders for the time being of the coupons of reversion in the proportion of the nominal value of the said coupons held by them respectively."

Clause 14 provides for the determination of the trust in case of purchase of the telegraph companies by any Government if so decided by unanimous resolution of the trustees at a special meeting, confirmed by a meeting of certificate holders, in which event "the securities remaining subject to the trusts of the deed shall be realized under the direction of the trustees, and the net proceeds thereof after satisfying interest shall be employed in the redemption of the certificates in manner aforesaid, and the remainder shall be divided between the holders of coupons of reversion in manner aforesaid."

17. "It shall be the duty of the trustees to keep proper accounts."

18. "It shall be lawful for the trustees at their discretion to sell any of the said scheduled securities if and when such securities shall be capable of being sold in the market, and shall be sold by the trustees at a premium of not less than thirty per cent. over the price at which the same were pur-

chased or taken over by the trustees, and the proceeds of such sale shall be applied by the trustees as hereinafter provided."

Clause 19 provided that the securities should not be sold except by unanimous resolution of trustees at a special meeting that it was for the interest of the certificate holders to sell.

20. "The produce of every such sale or conversion as aforesaid shall be applied in the same manner as the surplus income arising from the annual produce of the scheduled securities," and there was a power, by a unanimous resolution of the trustees, confirmed by a special meeting of the certificate holders, to invest the produce of such sale in the purchase of securities of the same kind as the scheduled securities.

Clause 21 provided for a salaried secretary.

Clause 22 provided that there should be paid as a salary to the trustees "by way of remuneration to them for the trouble and responsibility undertaken by them, any sum not exceeding in the aggregate £1,200 per annum."

Clause 23 provided for an annual general meeting of certificate holders, and that such meeting should be conducted in the manner prescribed by the Companies Act, 1862, table A.

Clause 30 provided for the appointment of new trustees if any of the trustees should die or become incapable to act, or should retire from the trust.

The plaintiff was a certificate holder under the provisions of the trust deed, and, on behalf of himself and all other certificate holders, brought an action against the trustees before the Master of the Rolls, alleging that the Submarine Cables Trust ought to have been registered under the Companies Act, 1862, and not being so registered was illegal; and also that the purchase of certificates by lot was a transaction in the nature of a lottery and illegal; and praying that the property subject to the trusts of the deed might be divided between the plaintiffs and the other certificate holders, and that a receiver might be appointed. The nominal value of the scheduled securities was over £400,000.

It appeared that no sales had been made of the scheduled securities, except to a trifling amount on the amalgamation of certain of the telegraph companies; that no certificates had been selected for redemption by lot, but that some certificates had been bought under the 5th clause with the proceeds of sale of the scheduled securities sold.

The Master of the Rolls decided that the trust was clearly within section 4 of the Companies Act, 1862, which provides (*inter alia*) that "no company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of this Act for the purpose of carrying on any business having for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof,

unless it is registered as a company under this Act, or is formed in pursuance of some other Act of Parliament or of letters patent, or is a company engaged in working mines within and subject to the jurisdiction of the Stannaries."

The trustees appealed.

In consequence of the decision in *Wallingford vs. Mutual Society*, L. R. 5. App. Cas. 685, the contention that the purchase of certificates was illegal under the Lottery Acts was abandoned by the plaintiff.

CHITTY, Q. C., AND SPEED, for the Appellants.

INCE, Q. C., AND C. B. MACLAREN, for the Respondent.

JAMES, L. J.—This case has been very fully argued, and we have had an opportunity of considering it since the time when it was first argued before us.

I am of opinion, with all deference to the very clear opinion to the contrary, often repeated, of the Master of the Rolls, that he has not put a construction upon this Act of Parliament which I find it possible, speaking for myself, to concur in.

The Act of Parliament, no doubt, was intended to prevent mischief of some kind, the mischief being, as was very well put by Mr. Speed in one of his later observations, the mischief arising from persons having contracts with bodies fluctuating, and not knowing whom they were. Where there was a large trading understanding, carried on by a large body of persons or fluctuating body, putting persons dealing with them to very great difficulty and expense, which was, therefore, a public mischief to be repressed—that was the sort of mischief, as it strikes me, which was intended to be repressed by this enactment. Then we must see what the enactment is. What is it that the enactment has done? It has said that, "No company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of this Act for the purpose of carrying on any business"—that is to say, any business, other than banking, that "has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof."

Now, there are three words there, "company, association, or partnership." It is very difficult, to my mind, to understand what the difference is between a company and an association. My intellect is not capable of comprehending the difference. The word "association" in effect, though it has now commonly got into use, is etymologically an inaccurate word. Association does not describe the thing formed, but association properly and etymologically describes the act of associating together, from which act of associating there is formed a company or partnership—there is formed a body or what Mr. Ince called *societas*. But I believe the difference which was meant, and the difference according to the vernacular we use in these

things, between a company or association and an ordinary partnership is this. An ordinary partnership is a parthership composed of definite individuals, bound together by contract between themselves to continue for some joint object either during pleasure or during a limited time, but the partnership is essentially composed of the persons originally entering into the contract with one another. A company or association, which I take really to be synonymous terms, is an arrangement by which parties intend to have a partnership, which would be constantly changing—that is to say, to have what I may call a succession of partnerships, a partnership to-day consisting of certain members, but to-morrow consisting of some of those members only and some others who have come in. Hence there will be a constant shifting of the partnership, a determination of the old and a creation of a new partnership, formed with a view, and always formed with the intent, so far as the members can, by agreement between themselves, of binding the next partnership to take upon itself the assets and debts of the old partnership. This object could not be effected in point of law by any arrangement between the persons themselves, unless the persons contracting with them by a *novatio* authorized the change; or, unless it was by special provisions in the Acts of Parliament which have given sanction to such arrangements, and to a certain extent, and under certain circumstances, have allowed that to be effected. That is the sole distinction between association and partnership.

But now the section says that no company, association, or partnership consisting of more than twenty persons shall be formed after the commencement of the Act. What for? "For the purpose of carrying on any business." Now, the deed of settlement, the trust deed, before us is said to constitute an association of more than twenty persons formed after the commencement of this Act "for the purpose of carrying on business." I am unable myself to agree with the Master of the Rolls in the conclusion that it comes within any part of that definition. I cannot myself find in this any association whatever between the persons who are supposed to be *socii*. I cannot conceive how there can be an association unless there are persons of whom that association is formed. But here one man goes with £100 in his hands and buys from the trustees who have got the property in them a £100 certificate with all the chance of profit attaching to it. Another man goes the next day and takes his £100 to the same people and gets from them another certificate by which he gets from them a right to share in the funds which they have got in their hands. The first man knows nothing of the second, and the second knows nothing of the first. They have never come to any arrangement whatever as between themselves. There never has been anything amounting to any mutual right or obligation as between those persons. The man who takes the certificate to-day, or who may have it to-day, and the man who took it yesterday and who may be selling to somebody else a week hence, are, from the first, entire strangers who have entered

into no contract whatever between themselves, nor have they entered into any contract with the trustees or any trustee on behalf of the other, there being nothing pointing to any mandate or delegation of authority to anybody to act for the shareholders between themselves and anybody else.

Therefore, I cannot myself arrive at the conclusion that this is an association within the meaning of this Act of Parliament, any more than the persons who subscribe for debentures in a railway, or the Bolivian bondholders (a case we had here a short time ago), or the creditors in that case of *Cox vs. Hickman*, 8 H. L. C. 268, were an association. Persons do not, according to my view, constitute an association who have no mutual rights and obligations. They do not constitute an association because they happen to have a common interest or an interest severally in something which is to be divided between them.

But now, going beyond that, it does not appear to me that it can, in any sense of the word, in any sense which any man of business would use it in dealing with this thing in the city or anywhere else, be said that this body was formed for the purpose of carrying on any business. The association—that is to say, the body of subscribers, or, the body of certificate holders—do not, as it appears to me, carry on any business. They cannot be said to carry on any business by themselves or by any agent. I am unable to conceive any state of circumstances in which the law would give any right to the body of shareholders as such, or fix any liability upon them as such. I cannot conceive any state of circumstances in which it could be avered that any contract had been made by or on behalf of the body of certificate holders, either by any members of themselves or by any one as agent or manager for them.

If so, I cannot conceive how people can be said to carry on business when they cannot enter into contracts. They can hardly be said to carry on business when it is utterly inconsistent with what they have done and with what they have said, and inconsistent with the whole thing that they should be parties directly or indirectly, either themselves or through any agent for them, to any contract, or be liable for any act of misfeasance or neglect of any manager, agent or servant. They could not employ a servant. More than that, what is the business? If there is any business at all, it is to be carried on by the trustees. What is to be done is to be done by trustees.

Now, the Master of the Rolls in the course of his judgment considered that these trustees were in substance and in law directors. With all deference to the Master of the Rolls, I cannot help thinking that the fallacy of his judgment arises from that fallacy. To my mind the distinction between a director and a trustee is an essential distinction. It is a distinction which lies in the very nature of things. A trustee is a man who is the principal, who deals with property as principal, as owner, and as master, subject only to an equitable obligation to account to some persons to whom he stands in

the relation of trustee, and who are his *cestuis que trustent*. The same individual may hold the office of director and be a trustee having property; but that is a rare, exceptional, and casual circumstance. But the office of director is that of being a servant. Of course, he may be called a director, but as between him and the company he is a paid servant of the company. He never enters into a contract for himself. He cannot sue or be suable unless he exceeds his authority, like any other agent, but he enters into contracts for his principal, and that principal is the company of whom he is a director and for whom he is acting. That seems to me to be the broad distinction between the two.

Then supposing that what is to be done here is to be done by trustees, is what the trustees are to do under this deed a business? In my opinion it is not a business at all; nothing which comes within the ordinary meaning of business, nor anything more than what is done by trustees under a mere settlement who have large properties vested in them, and who have very extensive powers of disposing of the investments, changing the investments, according to their discretion and judgment, with or without the consent of their *cestuis que trustent*. That is not a business. It appears to me that this is no more a business. This is a very large amount of property. There is £400,000 worth of stock of this kind, and I can easily conceive that a person, a millionaire, or some other person in this country might have £400,000 of similar securities, and might invest them in his trustees with every trust which is contained in this instrument, with every power and every control and everything which would be applicable to that trust, just as applicable as to the trust contained and expressed in this instrument. No doubt there is power in the 18th, 19th, and 20th sections of disposing of the investments, and of selling and re-investing in some security with the assent of the certificate holders. It appears to me to be no more than a power of assent with a general meeting (which would be quite as well expressed in an ordinary trust deed) of the *cestuis que trustent* themselves.

This seems to me to be the literal meaning of the deed; that is to say, a trust deed of property for investment, so as to secure a good investment spread over a great number of things, in order that the one may equalize the other, so as to enable persons who choose to invest their money in this way to avail themselves of that which, I believe, is one of the most certain things in this world of uncertain things—what is called the "doctrine of averages." That is the doctrine that, out of a certain number of things of this kind, some will lose and some will gain, some will pay large dividends and some will pay small dividends, and it appears to me that the object, and the legitimate object, of the persons who were invited join in this company was to have an investment of their money under such circumstances as that they might look to have a high dividend with a very considerable security for the capital which they were investing in it. As to evading the Act I can see

nothing like an attempt at evading it, or being anything but what the deed, upon the face of it, purports to be—a mode by which people are to make their investment with security, and so as to produce a high rate of dividend. Under those circumstances, I am of opinion that the judgment of the Master of the Rolls must be discharged.

BRETT, L. J.—In this case it becomes necessary carefully to construe the Act of Parliament, and in so doing one is obliged to consider almost every word and almost every phrase in it, and as one has often to do, to translate, if possible, into themost accurately scientific form idiomatic English, which is used, even in an Act of Parliament. not in its strictly grammatical sense, but in a business sense.

This Act of Parliament is in a negative form, and it begins by saying that "no company, association, or partnership consisting of more than twenty persons shall be formed"—that is to say, that there must be a Joint relation of more than twenty persons or a common purpose, which common purpose seems to me to be for the performing jointly of a succession of acts. It will not be sufficient if their relation consisted of a purpose which is to be completed by the performance of one act. But they are to be so related together as to form a company, or a partnership, or an association. I confess I have some difficulty, as my lord has, in being able to see at this moment what would be an association for the purpose of carrying on a business which would be neither a company nor a partnership; but I should be sorry to say that, by the ingenuity of men of business, there may not some day be formed a relation among twenty persons which might not strictly be either a company or a partnership, but yet would be an association. But it must be according to all ordinary rules of construction, if not strictly speaking a company or a partnership, an association of a similar kind. It must be, therefore, a relation established between twenty persons "for the purpose of carrying on business." It is well known that the phrase "for the purpose" is an English idiom; but here it means "in order that" such company, association, or partnership should carry on a business. Therefore the business is a business which is to be carried on by those twenty persons, or by twenty persons or more. It is they who are to carry on the business, whatever may be the meaning of that word "business." It is for the purpose of carrying on a business. That seems to me to exclude the case of its being for one particular act to be done and never to be repeated. The phrase "carrying on" means a repetition of acts. They are to be formed together for the purpose of a series of acts. But then that series of acts is to be a series of acts which constitutes a business. There are many purposes which everybody would understand to be a business. There may be new businesses which at the present time are not known. But now this word "business" might in a grammatical sense have been made to include something which no ordinary person would call a business, and, inasmuch as the legislature

did not desire to recapitulate in terms every kind of business, they have used a phrase which is to confine the meaning of that large word "business" to a certain style of business or kind of business. It is a business "that has for its object the acquisition of gain;" that is to say, gain is to be the result of the business, the result—not of one particular act, but the result of a series of acts which forms a business, and, if the series of transactions is successful, that series of transactions, if successful, would acquire a gain.

Now you come to deal with that gain when it is acquired. It is a gain by the company, association, or partnership, or a gain by the individual members thereof. It seems to me that that division of phrase rather is pointed to this—to be distributed according to the former description of the aggregation of persons. Where it is a company which is a joint stock company, or, it may be, a corporation, or, as my lord has said, a *quasi*-corporation, and where the individuals are mere shareholders, why then the gain which is acquired by the business carried on by such a company is a gain by the company, and is not a gain by the individual shareholders. But where it is an ordinary partnership, or where it is an association which, not being a joint stock company or corporation, is more like to a partnership—why, there the gain will be, not by the whole body as distinct from the individuals, but it would be by each partner by the individual partners.

But the mode in which the gain when obtained is to be distributed does not seem to me to be the real point in this case. The real point in this case is in the former part—to consider, whether there is any association of persons here at all for the purpose of such association of persons carrying on a business at all, within the meaning of this section—that is, when they are carrying on a business which, if successful, is to result in the acquisition of gain or not—and then the second question would be: If any set of persons here can be said to be within the category described, who are those persons?

Upon such a construction of the statute it seems to me that I must say that I cannot agree with the statement of the question which was laid down by the Master of the Rolls in *Sykes vs. Beadon*. He said that the point which he had to consider was, whether there was an association, or company formed for the purpose of gain, either by the association or by the individual members thereof. But he omitted to state that the proposition was, whether it was an association or company formed for the purpose of carrying on a business, because, according to his view of the question, it would be immaterial whether the gain was to be a gain which was to be the result of a business, or whether it was not. He seems to me to have left out those words which, I think, were purposely put into this statute for a definite object. I think, that the statute intends to deal, not with people associated together for the purpose of obtaining gain, but with people associated together for the purpose of carrying on a business, and that that was the

exact intention of the legislature in putting in those words which the Master of the Rolls has omitted in the case of *Sykes vs. Beadon*.

Then we must come to the particular case, and let us consider whether there were any persons at all here associated for the purpose of carrying on any business such as is described in this section. Now, if there were such persons in this case, they must have been either the trustees or the certificate holders. In my opinion, in this case, neither the one set of persons nor the other were associated together for the purpose of carrying on such a business as is described here. I will take first the trustees themselves. The trustees were not, as I construe the deed, or as I take to be the real substantial business object of this aggregation of persons, to enter upon a series of acts, which acts, if successful, would obtain a gain. They were joined together for the purpose of once for all investing certain money which was delivered into their hands, and not, by a repetition of investments, to obtain gain from that repetition of investments when successful. They were not associated together, in other words, for the purpose of speculating in shares. That was not their business. There is no reason, according to the construction of their duty, why, when they had once made an investment, it should ever be changed on the part of these individuals. Therefore, it seems to me, that the primary and substantial object of their associating together was not "for the purpose of carrying on a business which," if successful, would result "in the acquisition of gain." It is true that, under a very subsidiary state of circumstances, which is described in the 20th section, it might be said that then what they would have to do would result in a gain. That may be so. But even if that be so, with regard to the transaction under the subsidiary part of the transactions which are described in this deed, that cannot be said to be a substantial part of that which they would have to do. Therefore, if what they will have to do, as the substantial object, is not a business, that subsidiary part does not make it any more a part of their business. That was decided, I think, in the case of *The Queen vs. Whitmarsh*, and several other cases.

A mere subsidiary minor transaction described in the deed does not become a part of the object so as to bring the case within this statute. I might say, even if you consider the case of the trustees themselves, here they were not formed for the purpose of carrying on a business within the meaning of this section. But if they were, they are nevertheless not within the section, because they are not "of the number of twenty."

Now I come to the case of the certificate holders. It seems to me that even if what had to be done was to have been done by agents of theirs, nevertheless they were not associated for the purpose of carying on such a business as here described and for the same reason; that they were not to be liable even if what had to be done was done by agents of theirs; that what had to be done would not be a series of acts done, so that, if suc-

cessful, they would obtain gain, and therefore, would not be a business within this statute. The same reasoning would apply if these trustees had really been agents.

We must now go further and see whether, even supposing this was a business, the certificate holders were the persons who were to carry on that business in order by that business to obtain gain. It seems to me that they certainly were not. That raises the question of whether the persons who do carry on the business here were carrying it on for them, or were carrying it on otherwise than for them.

Now I take it that these persons here are clearly trustees as distinguished from directors in the ordinary sense of the term. The distiction has been pointed out by my lord, and I entirely agree with him, that if you could say the persons were merely called trustees, but that the duties which they had to perform by the deed were really those of directors; then, although they are called trustees, the legal effect of the deed would be that they would be directors. If they are directors, they are agents; but here, it seems to me to be obvious that, according to the true construction of this deed, they were not directors; they were not agents; they were trustees. If that be so, the certificate holders, even if you say they are associated, were not associated for carrying on the business which is said to be a business that will produce a gain. It was not their buiness. They could not have been made liable for any contract made by these trustees. It was of course urged, and very naturally urged, that they would be liable as undisclosed principals. But that assumes that the persons who made the contracts which are to make them liable are their agents authorized to bind them by their contracts, which is obviously not true. Therefore, here the business is not carried on by these persons, and it never can be, where those persons who are to carry on the business are *bona fide* trustees and not agents or directors. Even though there was a business here which, if carried on by anybody, would be within this section, yet here it is not carried on by the certificate holders, by the *cestuis que trustent*, who are the people who are said to be of a larger number than twenty. Even if this is a business within the section, it is not carried on by them, it is only carried on by the trustees. The trustees are not of the number of twenty or more, and therefore the case is not within the statute on either view.

That being so, I venture, with great deference, to differ from the Master of the Rolls in this case. It seems to me that that view of the statute carries with it also the allegation that one does not agree with the Master of the Rolls in the case of *Sykes vs. Beadon*.

But there is another case which has been mentioned, and that is the case of the *Arthur Average Association*. It is not perhaps absolutely necessary to determine whether that case of a mutual assurance association is within the statute or not; but I cannot help saying—I think I ought to say—that it

appears to me that the reasoning which brings me to the conclusion that the present is not within the statute would, as at present advised, bring me to the same conclusion with regard to the mutual assurance case. I cannot think that there is any business, if it is properly carried on, which is a business carried on in order to obtain a gain either for the association or for the individual members of it, within the meaning of this statute. I should almost think—I am inclined to think—that this is a true proposition, that no transaction within the association or company or between the members of it can be taken into consideration in order to determine whether the company or association was one formed to carry on a business within the meaning of this section.

COTTON, L. J.—What we have to determine in this case is whether this is an association, company, or partnership within the meaning of the Act of 1862. In my opinion, subject of course to one's general knowledge of the Act, it turns on section 4 of that Act. Section 21 has been referred to, but I do not think that it has any material bearing on the question we have to consider, for the companies which are referred to in section 21 might register under section 6 of the Act. What we have to consider is not whether the persons under this trust deed, as I call it for the sake of shortness, could register under the Act, but whether they are bound to do so, and, in default, are an illegal association.

Now section 4 has been discussed considerably. Therefore, I will not read it in detail. But this is material in arriving at the construction of the particular portion upon which the question turns, that it begins with a restriction as to companies carrying on a well known business—that is to say, companies formed for the purpose of carrying on the business of banking. That is the first part of the section, Then there comes a clause upon which the question turns, which is to apply to companies, other than banking companies, with certain exceptions; and that is material, because we have, without any reference to gain or anything else, a description of the business which companies in the first part of it are formed to carry on. Then, in the second part of it, which we have to consider, we have, in substance, reference to companies carrying on any other business, with this qualification, that the business must be one for the acquisition of gain by the company, association, or partnership, or by its members. That, in my opinion, shows that those words of this section "for the purpose of carrying on any other business" or, if you like to leave out "other," "for the purpose of carrying on any business which has for its object the acquisition of gain" are material and not to be disregarded, and that you cannot properly read this section as a section saying "any other association having for its object the acquisition of gain." In my opinion, what you have is this: That there must be a company, association, or partnership which by itself or its agents is carrying on a business—that is to say, the company or association or partnership must

be formed for that purpose. If it is formed for that purpose, before it carries on any business it must register if it is within the Act, and, therefore, it is the forming of an association for a purpose which is struck at by the Act, and there the purpose is, in the first instance, of carrying on a business. Then the nature of that business is defined in this way; it is in this part of the clause. It is not banking, banking business is excluded. Then it must be a business having for its object the acquisition of gain by the company.

I do not think it is very material to consider that much-vexed and contested word "association"—as to how far that differs from company or partnership; but I think one may say here that association, if it is intended here to differ from company or partnership, must be judged by its two companions between which it stands—that it must be something where the associates are in the nature of partners. It seems to me, not that I think it material, that it might have been intended to hit the case which one has frequently seen of a number of persons, or a number of firms, joining themselves together for the purpose of carrying on a particular adventure, in order to make gain by it, as is very common; where firms, one in London, another in Liverpool, and a third in the East Indies, join together, the one to carry on the one part of the business, and the other to carry on the other; one partnership to get the orders, or to order and see what goods shall be selected, the other to manufacture them; and the other, when they are imported to India, to sell them. That may be what was intended; but what we have to consider, in my opinion, is whether this conglomeration, as I will call it, of the persons who subscribe their money under this trust deed is an association formed to carry on any business within the meaning of this section, having for its object the acquisition of gain.

But, before I go into my view as to that, I will just state what I think really is the effect of this deed. As I understand it, this is a provision enabling a large sum of money provided by various persons to be invested on a large aggregate of securities of a particular class; an aggregate of so large an amount as to give a fair average in that particular class of security. Then it was obvious, upon the doctrine of averages referred to by Lord Justice James, they being securities which, as a whole, produce large profits, though some of them might not produce profit, that by taking a large number of investments, just as any private individual might have done if he had a large fortune and liked to invest it in that way, in the result, there would be a large sum to be divided, arising not from any particular investment, but from the whole of these investments, though some of them might not be so successful. Then, in the result, when the parties like to sell, having this large aggregate including so many of the particular class giving a general average, their money will be returned to them with a profit, as those things when they are successful do go up in price. That I think is what it is.

But then there is something more than that. The investments were

made in the names of trustees for a large number. It was necessary to make provision for their conduct; as to how decisions were to be come to by that body; as to what was to be done as regards the general business of the trust. Besides that, it was incident to this trust that there should be sometimes a change of investment. That is incidental to every trust, and that is provided for in ordinary trusts. Here we have, no doubt, a provision which at first sight is one which looks most like carrying on a business—clause 18, that under certain circumstances the securities may be sold, and then by clause 20 they are to be re-invested. But as regards the transaction carried on by somebody, if it appeared that the real object was that the trustees should speculate in investments even in this particular class, that would have stood in a very different position from what the present trust does with the present provision in it. In my opinion there is nothing of that sort. It is not a provision that they should make a profit by selling and buying again securities of this class whenever in their opinion the turn of the market makes it advisable so to do. But it is, in substance, a trust deed, a deed providing how they are to hold as trustees the securities of a large amount, with provisions incident to that enabling them in certain events to sell some of the securities, and enabling them, when that is done, but only under special circumstances, to re-invest, not to speculate, but to invest again, as an investment of this trust fund. Now, in my opinion, that is not not carrying on a business within the meaning of this Act of Parliament. It is a trust, holding trust property with certain provisions and with such provisions only as are necessary as a matter of practical business in order to enable that to be done. But what we have to consider here is not only that, but whether there is any association of persons more than twenty in number who are carrying on business by themselves or their agents.

Now, it was argued by Mr. Ince that the mere fact of these persons putting money without any contract or communication with each other into a bank to an account to be invested by the trustees under the trusts of this deed constituted them an association carrying on business for the purpose of gain. What I have already said as to the true construction of the 4th section I think shows that in my opinion, and it is my opinion, that that would not do. That would not be carrying on business. They may do it for the purpose of profit, and most persons when they invest their money do it for the purpose of profit—that is to say, they expect they will get a profit either in the shape of dividends, or probably that it is an investment which will go up and will produce them a profit when hereafter they wish to realize.

What, in my opinion as I have already said, must be shown is that the association by themselves or by their agents carry on a business. Now here how can that be said? That they do it by themselves I think can hardly be contended. It was, however, and I will deal with it. All the power which the subscribers of this money had was to attend sometimes at meetings, and the meetings which were held most usually are in clause 26. The only

business was to receive and consider a report from the trustees on the condition and affairs of the trust, to appoint auditors to audit the accounts, and to elect new trustees to fill any vacancy in their body. It is impossible, in my opinion, to say that they are by themselves in any way carrying on any business. That is simply receiving the accounts of the trustees which ordinary *cestuis que trustent* do without being supposed to carry on any business. That is exercising a power contained in most trust deeds—I may say in every well-drawn trust deed—the power of appointing new trustees. How can it be said that if there was a business to be carried on by the trustees they are there in any way by themselves at those meetings carrying on a business. Then there is this: Clause 20 says that a re-investment must be sanctioned at a meeting of the certificate holders summoned for that purpose. Now I have already dealt with the point that under clauses 18 and 20 there is not a carrying on of a speculation or power to carry on a speculation or business in that sense, and really all that is here given to the certificate holders is the power to give such assent as *cestuis que trustent* usually give for a change of securities, when they are competent to do so and not incapacitated by infancy or anything else. Of course the number of *cestuis que trustent* makes it necessary that that should be done in some way, that those who are actually present may bind those who are absent. Otherwise the assent of the *cestuis que trustent* could never be effectually obtained or given, and therefore it takes a form which we find, no doubt, as in a trust deed or articles of association of trading companies, with reference to the meetings of the partners or *socii*: but here that is only the form. Here they are *cestuis que trustent* meeting to give their assent, not members of the partnership joining to carry on and control the business of the partnership, even if this was a business carried on by the trustees.

Then can it be said that they carry on a business by their agents? In my opinion, that cannot be maintained. The trustees here are the only persons who are dealing, and they are dealing, not as agents for some principal behind, they are dealing as trustees in whom the property is vested, in whom the management of the property is vested, and who have the power of changing the investments and securities. That is just like the case which often occurs where executors are directed to carry on a business, or where trustees under a will are directed to carry on a business. The fact that they are to account to others for the profits made is a matter utterly immaterial as between them and those with whom they deal. They deal as the only persons contracting with outsiders—that is to say, those who deal and contract with them hold them personally liable. Those persons have no right whatever as against the persons beneficially interested—the *cestuis que trustent*—to make them directly liable, or possibly, with the excepted case of a testator having directed a part of his assets to be employed in the trade, any claim whatever against the assets of the testator. Those dealing with executors so carrying on a business deal with them as persons ordinarily

carrying on business. They look to no one else. But they look to them, and even although the executors have a right of indemnity if they act properly, that in no way affects or enlarges the contracts which they enter into with third parties with whom they may, in carrying on a business, enter into contracts. So far as there is any contract here to be entered into by the trustees, it is only a change of investment; so far as there is any business to be carried on it is the business of the trustees, not as agents for principals behind, but their own business—that is to say, the business in which they contract as solely liable to outsiders whatever may be their rights as against those for whom they are trustees.

In my opinion, therefore, in this case, the only alleged association of more than twenty being the persons who have contributed their money, stand in this position, that they are not by themselves or their agents carrying on any business whatever. Therefore, in my opinion, that cannot be said to be in any way an association hit by this Act. Of course if the trustees are carrying on a business for the purpose of profit, they not coming within the number, not being twenty in number, there could be no objection under the Act to their doing so.

In my opinion the view which the Master of the Rolls took of this section of the Act of Parliament cannot be maintained.

In the Supreme Court of the United States.

No. 819.

OCTOBER TERM, 1881.

CHARLES E. LEWIS, *Plaintiff in Error*,

vs.

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BARBOUR, *Defendant in Error.*

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF KANSAS.

ARGUMENT FOR DEFENDANT IN ERROR.

BY

EDWARD STILLINGS, THOMAS P. FENLON, AND A. M. F. RANDOLPH.

FILED _____, 1881.

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By EDWARD STILLINGS,
THOMAS P. FENLON, *and*
A. M. F. RANDOLPH.

STATEMENT OF THE CASE.

THIS is an action brought in the Circuit Court of the United States for the District of Kansas, at the June Term thereof, 1876, by Charles E. Lewis, of London, England, against the Board of County Commissioners of the County of Barbour, in the State of Kansas, to recover the amount alleged to be due the plaintiff upon one hundred coupons, each for the sum of $50, due September 1, 1875. (Certain other coupons were, by a subsequent agreement, included in the petition. Record,

p. 15.) Of these coupons, and of the bonds to which they had been attached, the said Lewis averred that he was the owner and holder at the beginning of his action as aforesaid.

The bonds to which these coupons had been attached are a series of one hundred bonds, each for the sum of $1,000, and amounting to the sum of $100,000. Each of these bonds purports to have been issued by Barbour county, in the State of Kansas, to aid in the construction of the Nebraska, Kansas & Southwestern Railroad through that county, and to have been executed under and in pursuance of an act of the Legislature of the State of Kansas, entitled "An act to authorize counties, "incorporated cities and municipal townships to issue "bonds for the purpose of building bridges, aiding in "the construction of railroads, water power, or other "works of internal improvement, and providing for the "registration of such bonds, the registration of other "bonds, and the repealing of all laws in conflict there-"with," approved March 2d, 1872.

Each bond purports to be payable in twenty years after its date, to the Nebraska, Kansas & Southwestern Railroad Company, or bearer, with interest thereon from date at ten per cent. per annum, payable semi-annually on the first days of March and September of each year, upon the presentation and surrender, as they severally become due, of the proper coupons therefor—both principal and interest payable at the National Park Bank, in the city and State of New York. Each bond purports to have been signed by S. H. Ulmer, chairman of the Board of Commissioners, and M. D. Houk, County Clerk of Barbour county, and to have been sealed with the seal thereof. (Record, pp. 15, 16.) Indorsed

on each bond is a certificate of its registration by the Auditor of State, November 19, 1873. (Record, p. 16.)

The county answered, in substance, that the bonds were fraudulently issued, that they are void from the beginning, and that the plaintiff is not a *bona fide* holder thereof for value. (Record, pp. 6, 7, 8, 9.) A jury was waived, and the case submitted to the court upon an agreed statement of facts. (Record, pp. 15–33.)

August 27, 1873, the proposition to vote $100,000 as a donation to the Nebraska, Kansas & Southwestern Railroad Company, and issue that sum in bonds to run thirty years, in payment of such donation, such bonds to be placed in escrow with the State Treasurer, and $50,000 thereof to be delivered to said company when its railroad should be completed to Medicine Lodge, and $50,000 more when completed through Barbour county, was duly submitted to the voters of that county, and carried. No part of said railroad was ever built, and no work was ever done thereon. The bonds and coupons disclosed in the petition were signed and sealed by the chairman and clerk of the Board of Commissioners of Barbour county, and by order of the board, at a meeting held by them at Hutchinson, in Reno county, and were left with one Hutchinson to be deposited with the State Treasurer, as was required by the submission to the people of Barbour county. The bonds were never deposited with the Treasurer of State, but were by the said Hutchinson procured to be registered by the Auditor of State, and then fraudulently put in circulation. (Record, p. 32.)

The records of the Board of Commissioners show said bonds to have been signed in accordance with the vote, to run twenty years, and bear 10 per cent. interest.

These records were made up from slips of paper before the signing of the bonds, but said records are wholly false. (Record, p. 32.)

December 1, 1873, an agreement was made between Wm. N. Coler, of the city of New York, of the one part, and the plaintiff Charles E. Lewis, and another, for and on behalf of a body established in London, England, called The Municipal Trust, of the other part, which Trust was to be established "with reference to "certain contemplated investments in American municipal "bonds," said Coler becoming thereby the sole American agent of the Trust. (Record, pp. 16, 21; p. 18, § 9.)

This agreement with Coler was entered into by the plaintiff as the trustee or agent of the Trust aforesaid. (Record, p. 18, § 9.)

Annexed to and made a part of said agreement was a certain schedule of bonds, in the possession of or under the control of Coler, which securities he guaranteed to have been duly issued. (Record, pp. 16, 17, 19, 20.)

The plaintiff testified that said bonds were purchased of Coler as part of a block of $453,400 of American municipal bonds, of which these bonds formed $100,000. For such block of bonds Coler was to be paid $386,400. Of this sum he was paid $250,000 in cash, and $136,400 in the certificates of the Trust, issued at par. (Record, p. 20.

The certificates thus issued are the same as all other certificates issued to the owners of shares in the Trust, and represent the capital thereof, which is $1,150,000. (Record, p. 32.)

The purchase of these bonds and coupons was made

by the plaintiff, as agent for the Trust. (Record, pp. 20, 32.)

The Barbour county bonds are not mentioned in the schedule annexed to the agreement made with Coler. (Record, pp. 19, 20.)

There was no assessment roll in said Barbour county in the years of 1873 and 1874, and the roll of 1875 was the sum of $68,000 only. In 1873 the county was first organized, and contained but few inhabitants, and only 127 votes were cast upon the proposition to issue the bonds in controversy. At the date of purchasing these bonds, Coler furnished to the plaintiff a certificate signed by the Board of County Commissioners and the Clerk of Barbour county, dated November 6, 1873, wherein it was stated, among other things, that the number of inhabitants in said county was about 3,800, and that the taxable property therein exceeded $1,000,000; but such statement is wholly false. (Record, p. 33.)

The bonds were delivered by Coler to the Trust, as follows: April 30, 1874, $30,000; May 13, 1874, $50,000; June 4, 1874, $20,000; and were paid for on delivery, as above stated. (Record, pp. 31, 32.)

Coler has gone through bankruptcy, and is insolvent.

It is admitted that the plaintiff testified that October 30, 1875, he lent the said Municipal Trust the sum of 1,500 pounds sterling, and November 9, 1875, the further sum of 600 pounds sterling, of his own moneys, upon the security of a deposit of the coupons from the said bonds on which this suit is brought, and other similar coupons, and that he claims, as the money is still unpaid to the extent of 1,400 pounds sterling and upwards, that he is the sole holder and owner of such coupons in his own right. (Record, p. 32.)

It is admitted that the plaintiff purchased these bonds and coupons without notice of any fraud committed in the alleged execution and issue thereof, unless the agreed statement of facts shall be held to be notice. (Record, p. 16.)

Upon the agreed facts, the court below found, as a conclusion of law, that chapter 68 of the Laws of Kansas of 1872, under which these bonds and coupons purport to have been issued, required that they should be received and held in escrow by the Treasurer of Kansas, and be by him delivered to the party entitled thereto, in accordance with the provisions of that act; that said statute made such Treasurer the agent of the county of Barbour for the delivery of the bonds and coupons in question, and that they could not be valid and negotiable until they had so passed; that as it was admitted that they had not so passed, the plaintiff was not entitled to recover; and the court rendered judgment accordingly for the defendant, and against the plaintiff for costs. (Record, pp. 33, 34, 35, 36.)

ARGUMENT.

I.

The bonds and coupons in controversy were signed, attested, and issued at Hutchinson, in Reno county, Kansas, a place wholly without the jurisdiction of the Board of Commissioners of Barbour county, and at no possible legal session thereof. The statute relating to the meeting of county boards—the only statute on the subject in force when these bonds purport to have been executed and issued—is as follows:

"SEC. 13. The board of county commissioners shall meet in regular sessions at the county seat of the county, on the

first Monday of January, and the first Monday after the first Tuesday of April, and the first Mondays of July and October, in each year, and in special session on the call of the chairman, at the request of two members of the board, as often as the interest of the county may demand." (Laws of Kansas of 1873, ch. 74, § 1, amending § 13, ch. 25 of the General Statutes of Kansas of 1868. See also *P. & F. R. Rld. Co. v. Comm'rs of Anderson Co.*, 16 Kas. 302; *Morell v. Ingle*, 23 Kas. 32; *Comm'rs of Marion Co. v. Barker*, 25 Kas. 260.)

The bonds voted, if issued, were to be made payable in thirty years from their date, and to bear interest at the rate of seven per cent., payable semi-annually; but those issued as aforesaid were made payable in twenty years from their date, and to bear interest at ten per cent., payable semi-annually. (Record, pp. 15, 37, 6, 7.) The records of the Board showing that the bonds were executed in accordance with the vote, are wholly false. (Record, pp. 32, 38.) The bonds were left with one Hutchinson, to be by him delivered to the Treasurer of State; but this he did not do. He however procured their registration by the Auditor of State, and put them in circulation. (Record, p. 32.)

Under the crimes act of Kansas, in force September 1, 1873, the said bonds and coupons, as well as the above-mentioned false records, were and are forgeries.

The statute then in force is as follows:

"SEC. 115. Every person who shall forge, counterfeit, or falsely alter, or cause or procure to be forged, counterfeited, or falsely altered: *First*, Any warrant, order, bill, certificate, or other public security, issued or purporting to have been issued under the authority of this State, by virtue of any law thereof, by which the payment of any money, absolutely or upon a contingency, shall be promised, or the receipt of any money, goods or valuable thing shall be acknowledged, or which shall be, or purport to be, receivable in payment of the State; . . . with intent to defraud this State, or any public officer thereof, or any other person, shall on conviction be adjudged guilty of forgery in the first degree."

"SEC. 118. Every person who shall falsely make, forge, or alter, or cause or procure to be falsely made, forged, or altered, any entry in any book of records, or any instrument purporting to be any record or return, specified in the last section, with intent to defraud shall upon conviction be adjudged guilty of forgery in the second degree."

"SEC. 134. Every person who, with intent to defraud, shall pass, utter or publish, or offer or attempt to pass, utter or publish, as true, any forged, counterfeited or falsely uttered instrument or writing, or any counterfeit or imitation of any gold or silver coin, the altering, forging or counterfeiting of which is hereinbefore declared to be an offense, knowing such instrument, writing or coin to be altered, forged or counterfeited, shall upon conviction be adjudged guilty of forgery in the same degree hereinbefore declared for the forging, altering or counterfeiting the instrument, writing or coin so passed, uttered or published, or offered or attempted to be passed, uttered or published."

"SEC. 137. Every instrument, partly printed and partly written, or wholly printed, with a written signature thereto, and every signature of an individual, firm, or corporate body, or of any officer of such body, and every writing purporting to be such signature, shall be deemed a writing and written instrument, within the meaning of the provisions of this act."

"SEC. 142. Persons convicted of forgery, as herein specified and declared, shall be punished as follows: *First*, Those convicted of forgery in the first degree, by confinement and hard labor for a term not more than twenty-one years; *second*, those in the second degree, by confinement and hard labor, not more than ten years. . . . " (Gen. Stat. of Kansas of 1868, ch. 31, §§ 115, 118, 134, 137, 142.)

The instruments in suit were never in a condition to be issued, and were never in fact delivered by the proper authority. (Record, p. 32.) The facts agreed upon show that they were in legal effect forged. (*Anthony v. County of Jasper*, 11 Otto, 697.)

Ought the defendant in error to be bound by bonds and coupons so concocted?

II.

The bonds were not, as required by the statute and the conditions of the vote, deposited with the Treasurer of

State, and were of course never by him delivered to any person entitled thereto. They never, under the statute, became negotiable, and as their execution was vicious and fraudulent, the plaintiff cannot recover thereon. They upon their face purport to have been issued under and in pursuance of the provisions of a certain act of the Legislature of Kansas—chapter 68 of the Laws of 1872. The eleventh section of this act is as follows:

"SEC. 11. That if the proposition for which bonds were voted be to aid in the construction of a railroad, or any bridge or other work of internal improvement, either by donation thereto or the taking of stock therein, then upon the subscription being made therefor, as hereinbefore provided, the officers of such county, city, or township [shall thereupon issue the bonds of such county, city or township] for the amount of such subscription, and shall forthwith deliver the same, together with the original, or a copy of the subscription, setting forth its terms in full, to the Treasurer of State; which said bonds shall be held by the said Treasurer of State in escrow until the conditions in the terms of the said subscription to such railroad or other work of internal improvement shall be in all things fully complied with; that upon the conditions of the said subscription being in all things fully complied with, then the Treasurer of State shall deliver such bonds to the parties entitled thereto, who shall have the same registered as hereinafter provided: *Provided*, That such bonds shall not bear interest or be negotiable until after the delivery and registration thereof: *And provided further*, That in case of a failure to comply with the conditions in the terms of such subscription, then such bonds shall be by the said Treasurer of State canceled, and redelivered to the county, city, or township issuing the bonds: *And provided further*, That this section shall not apply where the people may have named some party as trustee in their vote on the proposition, and the contractor may thereafter agree to the same."

The purpose of this section is plain. In the words of the opinion of the court below:

"It was intended to protect the tax-payers of the counties in Kansas against an unauthorized or fraudulent is-ue of bonds under the act, without a compliance with its provisions. Prior to its passage the law had been settled that,

in the absence of legislation to the contrary, bonds purporting on their face to have been issued and delivered by the authorities of a county, in pursuance of law, operated in the hands of a *bona fide* purchaser, to estop the county from denying their validity. The Legislature of Kansas undertook to provide by law, certain safeguards against fraud. These are set out in the act above mentioned. All such bonds were to be delivered to the Treasurer of State, to be held by him in escrow until the terms of subscription should be fully complied with, and, upon such compliance, to be by him delivered to the parties entitled thereto. Such delivery by the Treasurer is made by the act a condition precedent to the negotiability of the bonds. The proviso declares that such bonds shall not bear interest or be negotiable until after the delivery and registration thereof. . . . If, therefore, the statutory provision above quoted is to have the force and effect evidently intended by the Legislature, the bonds must be held non-negotiable, and bad in the hands of the plaintiff." (Record, p. 34.)

But counsel for plaintiff in error, in their brief, (pp. 22–30,) stoutly insist that although the bonds run twenty years instead of thirty, and were executed outside of the county of Barbour; that although the records concerning their issue are wholly false; that although no part of the railroad for which they were voted has been built; that although they were never deposited with the Treasurer of State, and were of course never by him delivered; yet that the county is estopped from denying their negotiability because they appear on their face to be negotiable, and purport to have been issued in accordance with the statute. Counsel ignore the important and very significant relation of the Treasurer to bonds issued under this act, and persistently belittle his duties and responsibilities in regard thereto. They say, (Brief, p. 25,) that "the State Treasurer is not the final arbiter, "by whose act these bonds were to be made valid, ne- "gotiable instruments," and that "he is to keep no rec- "ord, and do no official act;" that, (Brief, p. 26,) "if the

"Treasurer is made the agent of the county, it is solely "for the delivery of the bonds; . . . that he "is to determine absolutely nothing;" that, (Brief, p. 27,) "their negotiability is made to depend, not on de- "livery by the Treasurer, but upon their registration by "the Auditor."

Section 22 of the above act is as follows:

"SEC. 22. The Treasurer and Auditor of State shall annually, on the 30th day of November of each year, publish a detailed statement of the business transacted by them during the preceding year, under the provisions of this act."

It is clear that the Treasurer, as well as the Auditor, must keep a record to comply with this section; and that thereby it could be easily ascertained by inquiry whether both the requisites of the statute, to wit, delivery and registration, had occurred, so as to render the bonds negotiable. If force is given to both these requirements of the statute, the bonds never became negotiable. The construction of the statute claimed by the plaintiff cannot be maintained without making the statute read as it would if the words "*until after delivery*" were stricken out. This would make it a different statute. If the Legislature had intended that the registration alone should make the bonds negotiable, it would have left out the words "*after delivery.*" The rule is, to construe a statute so as to give force to every part of it. That rule the counsel for the plaintiff has overlooked. The plaintiff and his associates understood this to be the rule when they required Coler to guarantee as a condition of the contract of purchase, that these bonds had been legally issued. (Record, p. 17, § 2.)

The State Treasurer must give a bond in the sum of $1,000,000. He is the only officer whose bond would

answer for a delinquency in the delivery of bonds in a considerable amount. The provision is a wise one; therefore it prescribed him as the only officer who could deliver these bonds and bind the county of Barbour. The fact of his action or non-action could be easily ascertained. The law did not intrust the officers of the county with power to bind the tax-payers of the county. Their certificates were therefore of no force. The law did not empower the Auditor alone to bind the tax-payers, but required both his act and that of the Treasurer of State, and for obvious reasons. It seem to us that if the case now before the court does not present just such a case of fraud as this law was intended to prevent, it would be difficult to find one.

If these bonds, instead of being abortive as they are, had been in truth and in fact duly executed, then § 11, *supra*, imperatively required the Commissioners of Barbour county to—

"Forthwith deliver the same, together with the original, or a copy of the subscription, setting forth its terms in full, to the Treasurer of State; which said bonds shall be held by the said Treasurer of State in escrow until the conditions in the terms of the said subscription to such railroad or other work of internal improvement shall be in all things fully complied with; that upon the conditions of the said subscription being in all things fully complied with, then the Treasurer of State shall deliver such bonds to the parties entitled thereto, who shall have the same registered as hereinafter provided: *Provided*, That such bonds shall not bear interest or be negotiable until after the delivery and registration thereof: *And provided further*, That in case of a failure to comply with the conditions in the terms of such subscription, then such bonds shall be by the said Treasurer of State canceled, and redelivered to the county, city or township issuing the bonds."

The commissioners of a county have no lawful power to put in circulation the bonds which they have duly executed, but they must—except such as are specified in the

third proviso of §11, *supra*—forthwith deliver the same to the Treasurer of State. Of course, the recital therein is, as to the officers executing such bonds, wholly retrospective, and is to be taken as *prima facie* evidence of a compliance with the provisions of the act under which they purport to have been issued, only up to and including the date thereof, and not afterward. The purchaser may presume a compliance with such provisions of the statute as relate to the manner of exercising powers by law conferred upon officers of the county, up to such date, and not later.

The vital relation of the Treasurer to all bonds but the excepted ones above noted, is apparent. The statute imposes upon that officer, not simply the mere mechanical duty of holding such instruments and possibly of delivering the same to the parties entitled thereto, but it expressly imposes upon him alone the duty of determining whether the conditions of the subscription have in his judgment been in all things fully complied with.

Counsel for plaintiff contend that the Auditor's conclusion as evidenced by his certificate, whether the same be true or false, is final, and binding upon the county; that the "act will bear no other interpretation; that if it does "not mean that, it means nothing, and all the decisions "of this court upon the question of estoppel must be "taken for naught." They also regard the bond-registration law of Missouri, construed in 11 Otto, 697, as "almost identical" with that under consideration in this case. (Brief, pp. 27, 28.)

On the contrary, the Missouri statute, instead of being almost identical with that under which the instruments in dispute profess to have been issued, has no provision whatever for holding such securities in escrow and deliv-

ering the same to the party entitled thereto. If the double provision of the Kansas statute is to be regarded as incorporated in these bonds, and is to be read as a part thereof, then they appear on their face to be negotiable only upon an actual compliance with both requirements named in the act. To hold otherwise is to nullify the statute, which was passed for the very purpose of providing certain safeguards against the fraudulent issue of bonds by agents of the county. If the statute is construed so as to permit such agents to estop the county by such fraudulent issue, the statute is without vitality.

A purchaser of municipal bonds must take notice of the terms of the statute under which they are issued, as if the same were set out in full on the face of the bonds. "To be a *bona fide* holder, one must be himself a pur-"chaser for value without notice, or the successor of one "who was. Every man is chargeable with notice of "that which the law requires him to know, and of that "which, after being put upon inquiry, he might have "ascertained by the exercise of reasonable diligence. "Every dealer in municipal bonds, which upon their "face refer to the statute under which they were issued, "is bound to take notice of the statute and of all of its "requirements." (*McClure v. Township of Oxford*, 4 Otto, 432.)

The above language fits this case exactly. It certainly does not encourage any dealer in municipal bonds to "play blind-man's-buff" in his business. If the plaintiff as the agent for, and as the exponent of, that inscrutable agglomeration of individuals named and styled "The Municipal Trust," (which is not a corporation, or a company, or a copartnership, but a private association formed under a certain deed of trust or settlement, of

which association plaintiff is the head or chairman, (Record, pp. 20, 21; plaintiff's brief, pp. 31, 33,) said Trust being a body established in London "with reference to "certain contemplated investments in American municipal "bonds, on the principles of the prospectus," etc., (Record, p. 16,)—if the plaintiff on behalf of this Trust had exercised reasonable diligence before he bought these bonds for it, he would have ascertained that the "Nebraska, Kansas & Southwestern Railroad Company" never had any existence in Kansas, or anywhere else; that said company was never anything but an "airy nothing," which of course had not so much as ever begun to build a railroad that might by-and-by extend into Barbour county. If he had read § 11, *supra*, it would have caused him to inquire whether the bonds had been duly delivered. By inquiring of the Treasurer of Kansas, he could easily have ascertained the fact that they had never been by that officer held in escrow, and of course were never by him delivered to any person thereto entitled. If he had noticed when the bonds seem to have been signed and sealed, and the date of their registration, in view of the requirements of §§ 11 and 14 of the act, it might have occurred to him that 79 days—possibly but 49—is too short a time within which to construct such a railroad, and to comply with such conditions as would entitle anybody to receive from the Treasurer and become a *bona fide* holder of municipal bonds to the amount of $100,000.

Counsel for plaintiff argue that "if the State Auditor "were not made an officer of the county, whose recital "of a fact would bind the county, these bonds would "still be valid, because they were caused to be registered "and fraudulently put in circulation by one Hutchinson,

"into whose hands the bonds were placed by the order "of the Board of County Commissioners, as the agent "of Barbour county." (Brief, p. 29.) But to quote from the opinion of the court below:

"The law constituted the Treasurer of State the agent of the county for the purpose of issuing these bonds, and made their negotiability dependent upon the condition precedent of delivery by him. If he had performed this duty — if he had acted as agent — however irregular or even unlawful his action, the county might be estopped. But not so where he did not act at all, and the bonds were set afloat by the fraudulent act of another. No representations by a pretended agent can ever establish the fact or extent of agency. If Hutchinson represented that he was authorized to negotiate the bonds, he could not thereby bind the county. The agent for the county for the purpose was named by law, as well as by the act of the county, and there was no excuse for accepting without inquiry as final, the statements of any other person. (*Trust Co. v. Beebe*, 3 Selden, 364.) The plain meaning of the statute is, that the bonds are not to be regarded as issued until delivered under the act by the Treasurer of State. Until so delivered, they are in escrow, and of this the public has notice in the terms of the law itself. In *Chisholm v. City of Montgomery*, 2 Woods, 594–5, Mr. Justice Bradley said: 'The plea that the city is estopped by the acts of its officers, by the resolutions of the city council, or by the negotiable form or other matter in the bonds themselves, from denying the authority of such officers to pledge the faith of the city in aid of said plank roads, and to issue the bonds in question, cannot be maintained. Public officers cannot acquire authority by declaring that they have it. They cannot thus shut the mouth of the public which they represent. The officers and agents of private corporations, intrusted by them with the management of their own business and property, may estop their principals and subject them to the consequences of their unauthorized acts, but the body politic cannot be thus silenced by the acts or declarations of its agents. If it could be, unbounded scope would be given to peculations and frauds of public officers. I hold it to be a sound proposition that no municipal or political body can be estopped by the acts or declarations of its officers from denying their authority to bind it. (*The Floyd Acceptances*, 7 Wall. 666.) Finally, that the plaintiffs are *bona fide* holders of the bonds, cannot avail where the defense is —

want of power to issue them. Of this defect the plaintiffs were bound to take notice. Had the power to issue the bonds existed, and had the question been whether certain preliminary conditions had been complied with, the plea might, under certain circumstances, have been a good one.' If this is the law where an officer of the corporation has exceeded his power, it is the law applied to the present case, where he who was authorized did not act at all, and an outsider, for purposes of fraud, undertook to do so. The conclusion reached renders unnecessary any consideration of the other questions discussed by counsel." (Record, p. 36.)

Delivery is as necessary to make negotiable securities binding, as it is to make any other contract binding. (1 Daniel on Neg. Instr., §§ 7, 63, 1582.) The exception is the case in which an innocent holder may claim the benefit of the doctrine of equitable estoppel. This statute was intended to do away with that estoppel as to bonds issued thereunder, until actual delivery; otherwise the provision that bonds issued under this law should not be negotiable until delivery has no force. The provision is reasonable. It requires the party who shall purchase, to ascertain whether the bonds have been delivered. It was competent for the Legislature to stamp the bonds as *negotiable*, *non*-negotiable, or only negotiable after certain facts should occur. If the act under which the bonds were issued had provided that they should not be negotiable if any irregularity occurred in their issue, it would bind the purchaser. If it had provided that if any fraud occurred in the issue of the bonds, they should not be negotiable, it would bind the purchaser. (1 Daniel on Neg. Instr., § 197; *Vallett v. Parker*, 6 Wend. 615.) The law provides what shall be a delivery, and places it out of the power of the county officers to deliver the bonds or make them negotiable; and therefore, all that is said about the estoppel of the county by their acts, fails to have any force. The bonds

were not negotiable by law when they passed from the control of the county board. Events which were to occur afterward were to make the bonds negotiable, or they would never be so. The purchaser was notified by the law that certain facts must exist, over which the county officers had no control, before the bonds could assume the character of negotiable securities, and that he must ascertain those facts before he could purchase them as negotiable securities free from informalities. If this Association failed to regard the warning, it and not the tax-payers of Barbour county must be the sufferer.

III.

The plaintiff is not a *bona fide* purchaser and holder of the coupons in suit, and therefore he cannot recover.

The agreed statement of facts showing that the bonds with their coupons were fraudulently executed and put in circulation, the plaintiff must show that he, without notice of their fraudulent origin, gave value therefor, before the maturity of the coupons sued upon. (*Smith v. Sac County*, 11 Wall. 139; 1 Daniel on Neg. Instr., § 815, and cases cited.)

The bonds were bought of one William Nicholas Coler, under a written agreement made and entered into December 1, 1873, between said Coler, of the one part, and the plaintiff, Charles Edward Lewis, and another, for and on behalf of "The Municipal Trust," of the other part, (Record, p. 16,) which Trust was created December 15, 1873. (Record, p. 21.) By this agreement Coler was appointed the sole American agent for the Trust, whose agent, Lewis, was not to be in any way personally liable to Coler in the agreement made as aforesaid. (Record, p. 18, §§ 8, 9.) The plaintiff tes-

tified that "said bonds were purchased of said Coler as "part of a block of $453,400 of American municipal "bonds, of which these bonds formed $100,000; for said "block of bonds it was agreed to pay said Coler "$386,400; that of the sum so agreed to be paid, "$250,000 was paid in cash, and the balance, $136,400, "was paid in the certificates of the Trust, issued at par; "that these bonds and coupons were purchased for the "account of the Trust." (Record, p. 20.)

The committee of the Trust was to have a lien upon all bonds furnished by Coler, for all moneys paid and certificates issued therefor, subject to a certain condition stated. (Record, p. 18, § 6.) Under the indenture creating the Trust, the holders of its certificates, (forms of which are given on pages 29 and 30 of the Record,) have a right to participate in its future profits, and to share in the proceeds of its assets. (Record, p. 24, §§ 17, 18.) The annual produce of its securities, and of all moneys arising from the payment or redemption of any of its securities, is to be applied, among certain other applications thereof, to the payment of the interest on the certificates and the redemption of the same. (Record, p. 23, § 10.)

The certificates issued by said Trust are the same as all other certificates issued to the owners of shares therein, and represent the capital of said Trust, which is $1,150,000. (Record, p. 32.) The bonds in suit were delivered by Coler to the Trust, April 30, 1874, $30,000; May 13, 1874, $50,000; June 4, 1874, $20,000. (Record, pp. 31, 37.) Coler guaranteed the validity of the bonds, (Record, p. 17,) and furnished to the plaintiff a certificate signed by the Board of Commissioners and the Clerk of Barbour county, dated Nov. 6, 1873,

wherein it was stated that the number of inhabitants in said county was about 3,800, and that the amount of taxable property exceeded $1,000,000, which statement is wholly false. There was no assessment roll in said county in 1873 and 1874, and the assessment roll of 1875 was the sum of $68,000 only. (Record, p. 33.) The bonds and coupons disclosed in the petition were left with one Hutchinson, to be deposited with the State Treasurer, as was required by the submission to the people of Barbour county. They were never so deposited, but were by said Hutchinson procured to be registered by the Auditor of State. (Record, p. 32.)

Counsel for plaintiff say that "Coler was the owner "or holder of these bonds at the time the agreement "referred to was made with him, and that they were "purchased of him and not through him as an agent "or otherwise, and the consideration was paid to him "for them," (Brief, p. 35;) that "they were purchased "of him by that very agreement, and he could not have "been created agent until the agreement for the pur- "chase was consummated." (Brief, p. 36.)

But the agreement, including the schedule of bonds (Record, pp. 19, 20) annexed to and made a part thereof, does not show that Coler owned or held the bonds in dispute at the date of his appointment as agent of the Trust; nor is it anywhere in the agreed facts shown that he did. As the record stands it appears that he did not hold the Barbour county bonds when he was made the "sole American agent for the Trust," and that after such appointment and as such agent, and also in conjunction with the plaintiff, his co-agent in the business, he acquired them for that body. (Record, pp. 17 and 18, §§ 1, 2, 4, 8, 9; p. 32.)

It is very probable that one Hutchinson, who had participated in the fraudulent issue of the bonds and procured their registration, and who, it is admitted, put them in circulation, delivered them to Coler, agent as aforesaid. If Coler did not in fact know the true nature of these instruments, he certainly received them under such circumstances as ought to have raised in his mind a strong suspicion of their illegitimate origin, and caused him to inquire at some one of hundreds of points in the immediate neighborhood of his office, (No. 17 Nassau street, in New York city,) where he would have been told that the company and the railroad for which they had been voted had no existence whatever. Why should Coler, as well as the plaintiff, his co-agent in the purchase of these securities, rely upon the recital therein of only a partial compliance with the provisions of the act under which they profess to have been issued, and upon a false statement concerning the population and taxable property of Barbour county — a statement which, even if true, was unprovided for by law, rather than directly ask the Treasurer of Kansas whether he had ever delivered them, and receive from him an official answer to the question?

The indenture of the Municipal Trust provides for a fund to be raised by subscription to purchase "American public municipal bonds," (Record, p. 22, § 8,) which fund and the bonds purchased therefor were represented by certificates of the sort received by Coler, to the amount of $136,400 of the purchase-money of the block of bonds bought of him for the Trust. Coler, therefore, in the very sale which is relied on by the plaintiff to constitute him a *bona fide* purchaser for value of the coupons in suit, obtained an interest in the Trust

as one of the beneficiaries of its fund, of which the $453,400 of bonds bought of him formed a part. He became an owner of these and other bonds of the Association, for himself and those whom he represented, in the proportion of $136,400 to $1,150,000—that is, nearly one-eighth of the bonds which formed the capital of the Association became his property, or the property of the persons for whom he was acting as agent. For the title, both legal and equitable, of all securities and funds of this Trust was in the holders of its certificates, who were the owners of the funds and the bonds. Coler could sell his interest, or he could keep it. He is not shown to have sold it, nor is it shown that anything has been paid on his certificates. The admitted facts leave these certificates, to the amount of $136,400, still in his hands as his own property, or as belonging to the persons for whom he acted. And the presumption is that this state of things continues. (1 Gr. Ev., §§ 41, 42.)

Counsel for plaintiff contend that because Coler is insolvent, and has gone through bankruptcy, "whatever "property he had, has, under the bankrupt law of the "United States, passed out of his hands, and is protected "in the hands of the present holders." (Brief, p. 34.)

But this is asking the court to find a fact not in the agreed statement of facts on which this case was submitted. Moreover, the assignment of this stock or interest in the fund created by these and other bonds of the Trust, to an assignee in bankruptcy, even if that fact may be found or presumed, is not a disposal of such interest in these bonds to a *bona fide* holder. The reasoning of the court in *Roberts v. Hall*, 37 Conn. 205, is in point. In that case, CARPENTER, J., after stating the facts in regard to the note sued on, and saying that commercial paper

may be properly used as security for a preëxisting debt, said:

"The purpose for which the paper was used is exceptional and unusual. We apprehend that cases like this are rarely to be met with in business circles. Let us examine it more carefully: A man has a piece of negotiable paper, with which he wishes to secure or pay certain debts. If there is but one debt, he can transfer it directly to the creditor, and the law protects the transaction. This is according to the usual course of business. But if he transfer it to a friend, to hold till due, and then collect it, and with its avails pay the creditor, that is unusual and suspicious upon its face, and requires explanation. Unless some good reason can be shown for such a proceeding, the law ought not to protect it. But it is said there are several creditors, which, it is claimed, sufficiently explains the fact, that the security was effected through the intervention of a trustee. Let us test this position. If the paper is right and free from defects, why not sell it in market, or get it discounted, and with its avails pay the debts at once? Or, if the debts are not to be paid until the paper is due and collected, why not retain it in his own hands until due, and if necessary sue and collect it in his own name? Such a course would be natural and usual. But what honest reason can be suggested, why it should be transferred to a third party, who has no interest in the matter, to be sued in his name? Such a course is unusual, and not in the course of trade. The transaction at once suggests the idea that there is some equity in favor of the maker, inherent in the note itself, and which can be made available against the payee, and which the payee is seeking to avoid."

The plaintiff, therefore, is the representative of Coler, or of those for whom Coler was agent, and the other associates in the Trust; and if he recovers, he does so for their benefit. In other words, the plaintiff cannot recover if a suit could not be maintained in the name of the associates of the Trust, if all were plaintiffs—including Coler. This Association did not become a *bona fide* purchaser for value by this transaction. Coler, if he owned the bonds before, continued to own part of them, and if he acted as agent of the prior holders,

he took these certificates for them, and they could not be *bona fide* holders under the agreed facts. Neither Coler, nor the parties for whom he made the sale to himself and the other associates, ever paid value for the fractional part of the bonds still owned by him or them; and therefore the rule, that when bonds are once shown or admitted to have been fraudulently or unlawfully issued, the holder must prove that he is a *bona fide* holder for value, has not been complied with by the plaintiff. It is not an answer to this, to say that the other associates have shown that they paid value for their part of the bonds. The purchasers must all be capable of taking title to these bonds, free from any infirmity, or no one of them is. Coler is presumed to be in privity with the antecedent holders of this paper —in privity with its first fraudulent circulation. (2 American Leading Cases, 336; 1 Smith's Leading Cases, p. 825 [610].)

This brings us to another branch of the subject. Suppose that notice to the other parties in this suit was necessary to avoid their title to their fractional part of these bonds: Coler had been, by the articles of agreement under which these bonds were afterward taken by the Association, made its general American agent. He is presumed to be in collusion with the antecedent holders, and will therefore be held charged with notice of the infirmity of these bonds. Acting as he was for the Trust, as well as the holders of these bonds, notice to him is notice to the present holders. (*Watson v. Wells*, 5 Conn. 468; 2 Leading Cases in Equity, ¶¶ 146, 147, §§ 48, 49; id. 162, 163.)

Coler did not receive these bonds in the usual course of business. The guaranty required of him and made

in his agreement with the Trust, (Record, p. 17,) placing them in a fund in which he retained an interest, his position as agent of such Association before his acquisition and delivery thereof to it for a common fund to which the securities were to be added, all negative the idea that this was a negotiation of them in the ordinary course of business. (1 Daniel on Neg. Instr., § 781, and cases cited; *Roberts v. Hall*, supra.)

It is admitted that the plaintiff testified that on October 30, 1875, he lent the Trust £1,500, and November 9, 1875, the further sum of £600, of his own moneys, upon the security of a deposit of the coupons in suit, and other similar coupons; and that, as the money is still unpaid to the extent of £1,400 and upwards, he claims to be the sole owner and holder of such coupons in his own right. (Record, p. 32.) From the foregoing admission, it may be presumed that the plaintiff, as such pledgee, took all these coupons not before the date of his first alleged loan to the Trust. As the $5,000 of coupons originally sued on were in fact due September 1, 1875, he appears to have taken them after their maturity. The next series of coupons, amounting to $5,000, was due March 1, 1876. (Record, p. 15.) If the plaintiff, as such pledgee, held these coupons on March 13, 1876, when this action was begun, (Record, p. 4,) why—since they were overdue, and his alleged claim against the Trust then amounted to more than $5,000—did he not also include them in his petition? "Other similar coupons," as above used, is an expression too vague to include for certain any specific coupons. From what little is revealed concerning this transaction, it is fairly supposable that all these coupons

were more than mature when plaintiff took them, as he says he did.

Counsel for plaintiff insist that he took these coupons, if in good faith, absolutely free from any infirmity, the same as though he were an original purchaser. (Brief, p. 35.)

But the plaintiff, by such advancement of his money, could get no better title to these coupons than he and his associates in the Trust had before such transaction. (1 Daniel on Neg. Instr., §§ 820–823, and cases cited.)

IV.

Even if the plaintiff were a *bona fide* holder of the bonds in question and the coupons in suit, he cannot recover thereon.

The Trust purchased the $453,400 of bonds at one purchase. It has not yet paid $136,400 of the purchase price, unless the issuance to Coler of certificates to that amount is payment to that extent. There is no complaint concerning the $353,400 of bonds, and the presumption is that they comply with the contract of purchase from Coler. These certificates are transferable, but not negotiable in any commercial sense of that term. The Trust, therefore, has in its own hands the means of protecting itself. There is no pretense that the $136,400 has been paid, or that any of the certificates issued to Coler have been taken up. These certificates are mere choses in action, and are non-negotiable in the sense in which that word is applied and used in relation to commercial paper. (2 McLean, 10; 14 Pet. 318.) They are to be paid out of a certain fund, and when taken in connection with the articles of association, even

The case was submitted on an agreed statement of facts; no power was given the Court to find other facts. But in no event would the plaintiff be allowed the benefit of an estoppel to collect this £1,400 on these bonds, while he has the same lien on undisputed bonds. It is not stated when the plaintiff so testified; if it was at the time this case first stood for trial, the plaintiff has received many times that amount on the valid securities since.

the time of their payment is in some cases to be determined by a sort of lottery. There is no absolute liability to pay, nor any definite time of payment, nor even a promise of any person, natural or artificial, ever to pay, except the promise of the officers or agents of this Trust, that the funds thereof shall be applied in a certain way; and if pay-day shall ever come in that way, the holders of certificates have the right to their share of the distributions. (*Dresser v. Mo. &c. Rld. Const. Co.*, 3 Otto, 92.)

V.

And now we come to the case of *Smith v. Anderson* before the Court of Appeals in England, in which case the character of a certain company called the Submarine Cables Trust was considered, and wherein it was "*held*, "that such a body was not 'an association for the pur- "pose of carrying on business having for its object the "acquisition of gain,' within the meaning of § 4 of the "Companies Act, 1862, and therefore, though there were "more than twenty subscribers, the body need not be "registered, and was not an illegal association, if un- "registered." (Appendix to plaintiff's brief, p. 1.)

Counsel for plaintiff say that "from the statement of "the case it is manifest the Trust under consideration "(in *Smith v. Anderson*, supra,) was identical with the "one now before this court, and the court says it is "neither a corporation nor a copartnership within the "ordinary understanding of business men, nor in the "meaning of the law — all the essential elements for "either being wanting." (Brief, p. 33.)

The analogy between this Trust and that considered

in the case above cited, fails in some very essential respects. In the Trust now before the court, the committee had full power, without consulting the certificate holders, to sell and reinvest, at their discretion. (Record, pp. 22, 23, § 8.) In that Trust no such power existed, and no power of sale except at a prescribed price, (Appendix to plaintiff's brief, p. 2, § 18,) and no power, except by a unanimous resolution of the trustees, confirmed at a special meeting of the certificate-holders, to reinvest the annual produce of the scheduled securities in the purchase of securities of the same sort as those sold. (Appendix, p. 3, § 20.) In this, the committee was appointed to invite subscriptions to form the fund which such committee was to manage, which subscriptions could be paid in money or in such securities as might come within the scope of the Trust. (Record, p. 21.) The Submarine Cables Trust was an association formed for the purpose of managing certain specific property already acquired, and for that purpose its trustees were appointed, who were to hold its scheduled securities, and in whose names the shares bought were to be placed. (Appendix, pp. 1, 2.) The Municipal Trust was formed for speculation and profit. Its securities were to be kept in the bank of the Trust, and to be drawn out by the trustees only in certain events and ways. (Record, p. 23, § 9.) If this Trust does not contain every element of a limited partnership, except the shifting membership, we are at a loss to know what would; and if it is not properly described as a joint-stock company, it is indeed difficult to give it a name. It seems to us that if this organization had been before the Court of Appeals, instead of the one considered in the case above cited, that

the court would have come to the same conclusion which the Master of the Rolls arrived at in *Smith v. Anderson*, supra.

But suppose it to be conceded, as counsel claim, that the Trust considered in the above case is "identical" with the one now before this court, and that this organization, like that, is not "an illegal association, if unregistered," under § 4 of the Companies Act of 1862, what is proved thereby? How is the plaintiff's case helped by it? What conceivable relation has the single point decided in the English case cited, to the present one? Grant that this Trust, which is neither a corporation, nor a company, nor a copartnership, but a private association, formed under a deed of trust or settlement, of which association the plaintiff is the head, and grant that it is very like* the Submarine Cables Trust, still we are not quite satisfied with being told that it is not this, nor that, nor the other. We want, not a negative, but an affirmative definition of The Municipal Trust, established in London "with reference to certain contemplated investments in American municipal bonds." We must ask, what is it?

Counsel for plaintiff say that we have been led into error by misunderstanding the nature of this Trust, (Brief, p. 30;) and then they forthwith proceed (pp. 31, 32) to explain the structure and functions — the anatomy and physiology, so to speak — of this fluctuating body, having the plaintiff in this case for its head, and tapering downward, and terminating in its certificate-holders. But after

*"*Hamlet.* Do you see yonder cloud that's almost in shape like a camel?
Polonius. By the mass, and 'tis like a camel, indeed.
Ham. Methinks it is like a weasel.
Pol. It is backed like a weasel.
Ham. Or, like a whale?
Pol. Very like a whale."
—Act. III, Sc. II.

reading their explanation thereof, and of the mysteries embodied therein, and studying the agreement which it made with Coler exactly two weeks before it was born under a certain indenture, (Record, pp. 16, 21,) as well as reading everything else said about it among the agreed facts, we at last find ourselves as to this Trust in the mental condition of one of the Judges, who, in giving his opinion in *Smith v. Anderson*, supra, said: "It is very difficult, to my mind, to understand what the difference is between a company and an association. My intellect is not capable of comprehending the difference." (Appendix, p. 4.)

But of these things we are certain: That even though this Trust is to be regarded as not an illegal association in England, yet that in this country it must be looked upon, in its mode of living, moving and having its being, as an anomalous, artificial creature, full of anfractuosities in its ways of doing business; that it purports to be and is, in fact, from head to foot, and through and through, an association of some sort solely created "for the acquisition of gain;" and, finally, that we can discover no reason why it should not in this case be treated substantially as though in its articles of association confessed to be a corporation or a joint-stock company.

We insist that the bonds and coupons in question are void—void from the beginning, and void into whosesoever hands they may go; that upon the agreed facts the law is with the defendant, and that the judgment of the Circuit Court ought to be affirmed.

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